

REPORTS OF CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SEPTEMBER TERM, 1895—JANUARY TERM, 1896.

VOLUME XLVI.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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By D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1895-6.

CHIEF JUSTICES,

T. L. NORVAL,

A. M. POST.*

JUDGES,

T. O. C. HARRISON,

T. L. NORVAL.†

COMMISSIONERS,

ROBERT RYAN,

JOHN M. RAGAN,

FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

A. S. CHURCHILL.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

* Became Chief Justice January 9, 1896.

† Re-elected November 5, 1895, and took his seat January 9, 1896.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

C. B. LETTON.....Fairbury.
J. S. STULL Auburn.

Second District—

B. S. RAMSEY.....Plattsmouth.

Third District—

A. J. CORNISH Lincoln.
CHARLES L. HALL Lincoln.
E. P. HOLMES.....Lincoln.

Fourth District—

B. S. BAKER Omaha.
CHARLES T. DICKENSON Tekamah.
JACOB FAWCETT Omaha.
W. W. KEYSOR.....Omaha.
CLINTON N. POWELL Omaha.
C. R. SCOTT Omaha.
W. W. SLABAUGH.....Omaha.

Fifth District—

EDWARD BATES.....York.
S. H. SEDGWICK York.

Sixth District—

WM. MARSHALL Fremout.
J. J. SULLIVAN Columbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

R. E. EVANS.....Dakota City.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALL Alma.

Eleventh District—

A. A. KENDALL St. Paul.
J. R. THOMPSON.....Grand Island

DISTRICT COURTS OF NEBRASKA.

v

Twelfth District—

W. L. GREENE.....Kearney.

Thirteenth District—

H. M. GRIMES North Platte.

Fourteenth District—

G. W. NORRIS Beaver City.

Fifteenth District—

M. P. KINKAID.....O'Neill.

W. H. WESTOVER.....Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLV.

ACHESON, M. C.
BERGEN, PAUL.
BRADLEY, J. A.
CARB, EUGENE E.
DETWEILER, J. O.
HAGUE, L. W.
LONG, JOHN W.

MACK, JUDAH L.
OLDHAM, WILLIS D.
PATRICK, W. R.
PRATT, EPHRAIM D., JR.
ROGERS, HERBERT M.
SPANOGLE, MARK.
TAYLOR, T. D.

WALKUP, A. E.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

AMENDED RULES OF COURT.

6. [NOTICE OF MOTIONS.]—Every application for an order in any case shall be in writing, and, except as to motions for rehearing, shall be granted only upon the filing thereof at least two days before the hearing and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

25. [ADMISSION OF ATTORNEYS.]—The applicant shall also, with his application, deposit with the clerk the sum of five dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the chief justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five dollars per day.

INSTRUCTIONS FOR PREPARING TRANSCRIPTS FOR THE SUPREME COURT.

1. The caption of the transcript should be as follows:

*Pleas before the District Court of the.....
Judicial District of Nebraska, in and for the County of
.....at a term thereof begun and holden in the
City of.....in said County and State, on the.....
day of.....One Thousand Eight Hundred and
Ninety.....*

Present, Honorable.....Judge.

(Here insert name of Judge before whom case was tried.)

.....Clerk.

(*McDonald v. Penniston*, 1 Neb., 324.)

2. The copy of the petition should be preceded by the following recital:

*Be it remembered, that heretofore, to-wit, on the.....
day of.....18....., a petition was filed in the office
of the Clerk of said Court in the words and figures following,
to-wit:*

3. Where an amended petition has been filed and there is no objection on that ground, copy only the *amended* petition. Where there is an appearance and no point is made on the summons, it should not be copied into the record. Other papers which are not to be considered in the supreme court should be omitted from the transcript. (Maxwell, Pleading & Practice [4th ed.], p. 777.)

4. Each subsequent filing or order included in the transcript should be preceded by a minute giving the date of the filing or order, as follows:

(x)

x INSTRUCTIONS FOR TRANSCRIPTS.

And afterwards, on the.....day of.....
18....., there was filed or entered of record in the office
of said Clerk a certain.....in
words and figures following, to-wit:

5. The complete title, showing the names of all the parties, should be set out in the final order or decree.

6. In cases where a supersedeas bond or undertaking is filed in the district court a copy of such bond or undertaking should appear in the transcript after the copy of the judgment.

7. Immediately preceding the certificate authenticating the transcript insert the date when the court adjourned *sine die* for the term during which the judgment was rendered.

8. The amount of fees of the clerk of the district court for making the transcript should in every case be noted on his certificate.

9. By referring to sections 586 and 675, Code of Civil Procedure, it will be observed that it is a *transcript* of the proceedings that is to be filed in the supreme court. The original papers will not take the place of a properly certified copy. The transcript, when filed, is a part of the records of the supreme court, and, aside from the inconvenience of handling original pleadings, there is no provision of law under which they may be returned to the district court. (*Moore v. Waterman*, 40 Neb., 498.)

10. The different parts of a record should be arranged as follows: The petition in error should appear first. The transcript should follow the petition in error, and the bill of exceptions should follow the transcript. Sometimes exhibits and other papers that belong to the bill of exceptions are mixed with those in the transcript. This should be avoided. The transcript and bill of exceptions should be separately prepared and separately authenticated. The bill of exceptions must sometimes be detached in the supreme court and returned to the district court, while the transcript

INSTRUCTIONS FOR TRANSCRIPTS. xi

remains permanently on file in the office of the clerk of the supreme court. (*Vaughn v. Crites*, 44 Neb., 814.)

11. The transcript must be filed with the petition in error, prior to the issuing of the summons in error. (*Garnau v. Omaha Printing Co.*, 42 Neb., 847.)

12. Bonds that are to be filed in the supreme court should not be attached to other papers.

13. In an error case where summons is waived attach the waiver to the petition in error.

RULES FOR CITATIONS.

1. Abbreviate as follows:

Atlantic Reporter—Atl. Rep.
Chapter—Ch.
Company—Co.
Edition—ed.
Federal Reporter—Fed. Rep.
Insurance—Ins.
Manufacturing—Mfg.
National Bank—Nat. Bank.
Northeastern Reporter—N. E. Rep.
Northwestern Reporter—N. W. Rep.
Pacific Reporter—Pac. Rep.
Page—p.
Railroad—R.
Railway—R.
Section—sec.
Southeastern Reporter—S. E. Rep.
Southern Reporter—So. Rep.
Southwestern Reporter—S. W. Rep.
Supreme Court Reporter—Sup. Ct. Rep.

2. Soule's Manual is the standard for abbreviations of Reports and Reporters.
3. "County" should never be abbreviated in a citation.
4. The name of an insurance company should be given in full, with the exception as to abbreviating the words "insurance" and "company," thus: *German-American Ins. Co.*
5. The first word of the name of a railroad company should be given in full and the words following should be abbreviated, thus: *Chicago, B. & Q. R. Co.*

6. The standard abbreviations for the names of states should be used.
7. The names of corporations should be given in full where the foregoing rules do not apply.
8. Do not abbreviate titles of text-books.
9. Do not abbreviate names of authors of text-books.
10. In citing text-books the number of the volume, where there is more than one, should precede the author's name.
11. In citing text-books the number or name of the edition, where there is more than one, should be inclosed in [] just preceding the page or section, thus: 2 Wharton, Evidence [2d ed.], sec. 490.
12. The title of a case should only contain the name of one plaintiff and one defendant, thus: *Smith v. Jones*, 1 Neb., 4; *Peoria Mfg. Co. v. German-American Ins. Co.*, 61 N. W. Rep. [Ia.], 467; *Chicago, B. & Q. R. Co. v. Douglas County*, 4 L. R. A. [Neb.], 27.
13. "*Et al.*" should be omitted from all citations.
14. Do not insert "administrator," "executor," "trustee," or other designation after names in titles.
15. "*Id.*" should never be used in citations.
16. The state or country in which the decision was rendered should be indicated in all citations from courts of last resort, thus: *Smith v. Jones* 4 Met. [Mass.], 823; *Johnson v. Woods*, 2 Beav. [Eng.], 409.
17. In citing the Federal Reporter do not indicate the state from which the case was appealed.
18. The names of the parties should be printed in italics.
19. The names of the parties should never be omitted from a citation.

See page lvii for table of Nebraska cases overruled.

The syllabus in each case was prepared by the judge or commissioner writing the opinion.

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page lxiii.

TABLE OF CASES REPORTED.

A.

	PAGE
Abbott, Van Horn v.....	62
Alfalfa Irrigation District v. Collins	411
American Nat. Bank of Kansas City, Mo., Goble v.....	891
American Nat. Bank of Omaha, Clafin v.....	884
American Water-Works Co. v. State.....	194
PLEADING. WATER COMPANIES. RULES. MANDAMUS.	
Archer, Chicago, R. I. & P. R. Co. v.....	907
Argabright v. State.....	822
BILL OF EXCEPTIONS. ORDER FOR TRANSCRIPT.	
Armagost, Gould v.....	897
Aultman, Viergutz v.....	141

B.

Baker v. Killinger.....	682
JUDGMENTS. ORDER VACATING. CONTINUANCE OF LIEN.	
Barker, Lewis v.....	662
Bartow v. Eastman.....	675
Bartram v. Sherman	713
FINAL ORDER. REVIEW.	
Beatrice Paper Co. v. Beloit Iron Works.....	900
ERROR AND APPEAL. ELECTION OF REMEDIES. JUDICIAL	
SALES. STATUTES.	
Beer v. Thayer.....	137
Beloit Iron Works, Beatrice Paper Co. v.....	900
Berg, Home Fire Ins. Co. of Omaha v.....	600
Berge v. Lansing	514
Bishop, School District Number One, Harlan County v.....	850
Blakely v. Chicago, K. & N. R. Co.....	272
RAILROAD COMPANIES. RIGHT OF WAY. EASEMENTS.	
Board of Directors of Alfalfa Irrigation District v. Collins.....	411
CONSTITUTIONAL LAW. IRRIGATION DISTRICTS. STATUTES.	
TAXATION.	
Board of Regents of the University of Nebraska v. Moore.....	373

xvi TABLE OF CASES REPORTED.

	PAGE
Board of Transportation v. Sioux City, O'N. & W. R. Co.....	682
Bohner v. Bohner.....	204
WITNESSES. HUSBAND AND WIFE. CRIME. SLANDER.	
Bowen v. State.....	23
REVIEW. RECORD.	
Boyes v. Summers.....	308
CONSTITUTIONALITY OF STATUTE. CHATTEL MORTGAGES.	
FAILURE TO ENTER SATISFACTION. PENALTY.	
Briggs, Shafer v.....	445
Brown, Smith v.....	230
Brumback v. German Nat. Bank of Beatrice.....	540
JURY. CHALLENGE. REVIEW. NEGOTIABLE INSTRUMENTS.	
INSTRUCTIONS. TRIAL. VERDICT.	
Bryant v. Thesing	244
SALES. ACTIONS FOR PURCHASE PRICE. QUALITY OF STOCK.	
PAROL EVIDENCE.	
Burkett v. Clark.....	466
EXECUTIONS. DUTY OF SHERIFF. ORDER OF SALE. LEVY.	
Butler County, Perkins v.....	314
Butt, Johnson v.....	220
Butters, Otis v.....	492

C.

Cady v. South Omaha Nat. Bank.....	756
TRUST FUNDS. BANK DEPOSITS. COMMISSION MERCHANTS.	
Campbell Printing Press & Mfg. Co. v. Dyer	830
SALES. ESTOPPEL. CHATTEL MORTGAGES.	
Carson, Thomas v.....	765
Chambers v. State	447
RAPE.	
Chapman v. Garber.....	16
CONTRIBUTION. PRINCIPAL AND SURETY. NEGOTIABLE INSTRUMENTS.	
Chicago, B. & Q. R. Co., Orgall v.....	4
Chicago, K. & N. R. Co., Blakely v.....	272
Chicago, R. I. & P. R. Co. v. Archer	907
EXPERT WITNESSES. HYPOTHETICAL QUESTIONS. PERSONAL INJURIES. DAMAGES.	
City of Omaha v. Megeath	502
MUNICIPAL CORPORATIONS. IMPROVEMENT OF STREETS.	
CONTRACTS. INJUNCTION.	
City Nat. Bank of Hastings v. Thomas	861
BILL OF EXCEPTIONS. ESTOPPEL. NEGOTIABLE INSTRUMENTS. BANKS AND BANKING. GUARANTY.	

TABLE OF CASES REPORTED.

xvii

	PAGE
Clafin v. American Nat. Bank of Omaha.....	884
REVIEW. OBJECTION TO JUDGMENT. DISMISSAL. PARTIES.	
Clark, Burkett v.....	466
Collins, Board of Directors of Alfalfa Irrigation District v.....	411
Collins v. State.....	37
CRIMINAL LAW. WITNESSES. HOMICIDE. EVIDENCE.	
Commercial Nat. Bank of Omaha v. Lipp.....	595
VOLUNTARY ASSIGNMENTS. CLAIMS.	
Commercial State Bank of Crawford v. Ketcham.....	568
REPLEVIN. AFFIDAVIT. CORPORATIONS.	
Conley v. State.....	187
SHERIFFS. CONVERSION. EMBEZZLEMENT.	
Connell, Galligher v.....	372
Conway v. Grimes.....	288
BILL OF EXCEPTIONS. LACHES. SETTLEMENT.	
Cooley v. State.....	603
CONTEMPT. SUFFICIENCY OF COMPLAINT.	
Cooper, Kaufmann v.....	644
Cooperrider v. State.....	84
TOWNSHIPS. MANDAMUS. PARTIES. SUPERSEDEAS.	
Creighton v. Finlayson.....	457
PRINCIPAL AND AGENT. COUNTER-CLAIM. REMITTITUR.	
Cuming County, Ragoss v.....	36

D.

Darnell v. Mack.....	740
FRAUDULENT CONVEYANCES. ATTACHMENT.	
Dawson Town & Gas Co., Gilkie & Anson Co. v.....	333
Deering v. Wisherd.....	720
SHERIFFS AND CONSTABLES. COSTS. ATTACHMENT.	
Dehning v. Detroit Bridge & Iron Works.....	556
MASTER AND SERVANT. RISKS OF EMPLOYMENT.	
NEGLIGENCE.	
Detroit Bridge & Iron Works, Dehning v.....	556
Diers v. Mallon.....	121
SHERIFFS AND CONSTABLES. ARREST AND DETENTION.	
FALSE IMPRISONMENT. EVIDENCE.	
Dixon v. State.....	298
CRIMINAL LAW. WITNESSES. ACCESSORIES. ABORTION.	
INSTRUCTIONS. ARGUMENT.	
Dobson v. State.....	250
LARCENY. POSSESSION OF STOLEN GOODS.	

xviii TABLE OF CASES REPORTED.

	PAGE
Dolan v. McLaughlin.....	449
INTOXICATING LIQUORS. ACTION ON SALOON-KEEPER'S BOND.	
Driscoll, Jones v.....	575
Dyer, Campbell Printing Press & Mfg. Co. v.....	830

E.

Eastman, Bartow v.....	675
Eccles, Hall v.....	880
Einspahr v. Smith.....	138
FINAL ORDER. INJUNCTION.	
Ernst, Murphy v.....	1
Evans, Hubermann v.....	784

F.

Farmers Loan & Trust Co. v. Killinger.....	677
JUDGMENTS. ORDER VACATING. CONTINUANCE OF LIEN.	
Farrell v. Reed.....	258
TRUSTS. MORTGAGES. DEFICIENCY JUDGMENTS. NEGOTIA- BLE INSTRUMENTS.	
Farris v. State, ex rel. Murphy.....	857
REVIEW. PLEADING. MANDAMUS.	
Finklestein, Storz v.....	577
Finlayson, Creighton v.....	457
First Methodist Episcopal Church of Omaha, Specht v.....	874
First Nat. Bank of Crete, Lanham v.....	663, 668
First Nat. Bank of Weeping Water, Reed Bros. Co. v.....	168
Ford v. State.....	390
JURY. CHALLENGES. TRIAL. CRIMINAL LAW. LARCENY. INTOXICATION.	
Fox v. Graves.....	812
PLEADING. VERDICT. ELECTION OF REMEDIES.	
Franklin County v. Vincent.....	408
Fremont, E. & M. V. R. Co., Board of Transportation v.....	682

G.

Galligher v. Connell.....	372
QUIETING TITLE. STARE DECISIS.	
Galligher v. State.....	606
CONTEMPT. SUFFICIENCY OF COMPLAINT.	
Garber, Chapman v.....	16
German Nat. Bank of Beatrice, Brumback v.....	540

TABLE OF CASES REPORTED. xix

	PAGE
Gilkie & Anson Co. v. Dawson Town & Gas Co.....	333
CORPORATIONS. LIABILITY OF STOCKHOLDERS.	
Goble v. American Nat. Bank of Kansas City, Mo.....	891
PLEADING. ACCORD AND SATISFACTION.	
Gould v. Armagost.....	897
CHATTEL MORTGAGES. EXECUTIONS. COSTS.	
Grabow, McDonald v.....	406
Graves, Fox v.....	812
Griffen v. State.....	282
CRIMINAL LAW. FORGERY. JUDGMENT.	
Grimes, Conway v.....	288
Grossman v. State.....	21
CRIMINAL LAW. EVIDENCE. REVIEW.	
Gulick, Johnson v.....	817

H.

Hale, Farmers Loan & Trust Co. v.....	677
Hall v. Eccles.....	880
CONTRACTS. ABANDONMENT. SALE.	
Hamilton v. State.....	284
EMBEZZLEMENT. CONVERSION. EVIDENCE.	
Hansen v. Kinney.....	207
REVIEW. MOTION FOR NEW TRIAL. LABORER'S LIENS. SEPARATE CONTRACTS.	
Hanson, Omaha Loan & Trust Co. v.....	870
Hards v. Platte Valley Improvement Co.....	709
CORPORATIONS. SUBSCRIPTIONS FOR STOCK. DIRECTING VERDICT.	
Haskins v. State.....	888
CRIMINAL LAW. INSTRUCTIONS. HORSE STEALING.	
Hanbrock v. Loeb..	868
CONFLICTING EVIDENCE. REVIEW.	
Hawes v. State.....	149
CONTEMPT. REVIEW. ATTORNEYS.	
Heald v. Polk County.....	28
OFFICE AND OFFICERS. COMPENSATION. COUNTY CLERKS.	
Hempstead, Commercial Nat. Bank of Omaha v.....	595
Hill, Board of Transportation v.....	682
Hocknell v. Roper.....	724, 730
Hoffman v. Moore.....	590
Holcomb, Horne v.....	88
Holcomb, Leidigh v.....	612

TABLE OF CASES REPORTED.

	PAGE
Home Fire Ins. Co. of Omaha v. Berg.....	600
PLEADING. EVIDENCE.	
Hopwood, McKinney v.....	871
Horne v. Holcomb.....	88
Hough v. Stover.....	588
ERRONEOUS JUDGMENTS. COLLATERAL ATTACK. REVIEW.	
Hubermann v. Evans.....	784
GUARDIANS' SALES. REGULARITY OF PROCEEDINGS.	
DESCRIPTION OF PROPERTY.	

I.

Insurance Company, Home Fire, of Omaha, v. Berg.....	600
Insurance Company, Nebraska & Iowa, McEvoy v.....	782
Irwin, Kreamer v.....	827

J.

Johnson v. Butt.....	220
ACTION TO QUIET TITLE. ADVERSE POSSESSION.	
Johnson v. Gulick.....	817
REVIEW. FALSE REPRESENTATIONS. NEGOTIABLE INSTRUMENTS.	
Johnson v. Parrotte.....	51
SUPREME COURT. JURISDICTION. CREDITORS' BILL. JUDGMENTS.	
Johnston v. Milwaukee & Wyoming Investment Co.....	480
PRINCIPAL AND AGENT. CORPORATIONS. CUSTOM AND USAGE. EVIDENCE.	
Jones v. Driscoll.....	575
APPEAL. TRANSCRIPTS. TRIAL. CONTRACTS. SET-OFF.	

K.

Kaufmann v. Cooper.....	644
CONTRACTS TO ERECT AND REPAIR STATE BUILDINGS. BONDS.	
Keens v. Robertson	837
AGREEMENTS OF COUNSEL. CONTINUANCE. INSTRUCTIONS. TRIAL. WITNESSES. DEPOSITIONS.	
Keeshan v. State	155
JUSTICE OF THE PEACE. JURISDICTION. APPEAL.	
Kennedy v. Merrick	260
CONSTRUCTION OF WILLS.	
Kennedy, Merrick v.....	264
Ketcham, Commercial State Bank of Crawford v.....	563

TABLE OF CASES REPORTED. xxi

	PAGE
Killinger, Baker v.....	682
Killinger, Farmers Loan & Trust Co. v.....	677
Kinney, Hansen v.....	207
Korth v. State	631
AFFIDAVITS. CRIMINAL LAW. APPOINTMENT OF PROSECUTING ATTORNEY. EMBEZZLEMENT. INFORMATION.	
Kreamer v. Irwin	827
BREACH OF CONTRACT. DAMAGES. TRIAL.	
Kyd, Wolfe v.....	292

L.

Lamma v. State.....	236
ARREST AND DETENTION OF FELONS. HOMICIDE.	
Lanham v. First Nat. Bank of Crete.....	663, 668
USURY. SET-OFF.	
Lansing, Berge v.....	514
Lawhead v. State.....	607
INDICTMENT AND INFORMATION. BURGLARY. CRIMINAL LAW. INSTRUCTIONS.	
Leidigh v. Holcomb.....	612
Lewis v. Barker.....	662
FINAL ORDER. REVIEW.	
Lindsay v. State.....	177
CRIMINAL LAW. HOMICIDE. PRIZE FIGHTING. MISCONDUCT OF ATTORNEY.	
Lipp, Commercial Nat. Bank of Omaha v.....	595
Loeb, Haubrock v.....	868

M.

McAleer v. State	116
CRIMINAL LAW. INSTRUCTIONS. EMBEZZLEMENT.	
McCormal v. Redden.....	776
NEGOTIABLE INSTRUMENTS. CONSIDERATION. PRINCIPAL AND SURETY. INSTRUCTIONS.	
McDonald v. Grabow	406
APPEAL. TRANSCRIPT. AUTHENTICATION.	
McEvoy v. Nebraska & Iowa Ins. Co.....	782
INSURANCE. PREMIUM NOTES. WAIVER OF DEFAULT.	
McFadden, Welty v.....	668
McGinn v. State.....	427
CONSTITUTIONAL LAW. CALENDAR MONTH. STATUTES. TIME OF GOING INTO EFFECT. PENALTY FOR MURDER. FORMER JEOPARDY. CRIMINAL LAW.	

xxii TABLE OF CASES REPORTED.

	PAGE
McKinney v. Hopwood.....	871
DIRECTING VERDICT. NEGOTIABLE INSTRUMENTS.	
McLaughlin, Dolan v.	449
McMahon v. State	166
CRIMINAL LAW. ARGUMENT. MISCONDUCT OF ATTORNEY.	
BURGLARY.	
Mack, Darnell v.....	740
Mallon, Diers v.....	121
Martin v. Miles	772
ELECTIONS. MANNER OF MARKING BALLOTS.	
Martin, Spatz v.....	917
Mayer v. Ver Bryck	221
PLEADING. SALES. CONTRACTS.	
Megeath, City of Omaha v.....	502
Merrick, Kennedy v.....	260
Merrick v. Kennedy	264
STATUTES. ADMINISTRATION OF ESTATES. APPEAL.	
COUNTY COURTS. WILLS.	
Metz v. State	547
CRIMINAL LAW. SEPARATE TRIALS. INDICTMENTS.	
BURGLARY.	
Meyer, Olsen v.	240
Meyers, State v.....	152
Miles, Martin v.....	772
Milwaukee & Wyoming Investment Co., Johnston v.....	480
Monroe v. Reid.....	316
APPEAL. PLEADING. FRAUDULENT CONVEYANCES.	
ABATEMENT.	
Moore, Board of Regents of the University of Nebraska v.....	373
Moore, Hoffman v.....	590
Morearty v. State.....	652
FORGERY. INFORMATION. INSTRUCTIONS.	
Murphy v. Ernst	1
MALICIOUS PROSECUTIONS.	
Murphy, Farris v.....	857
N.	
Nebraska & Iowa Ins. Co., McEvoy v.....	782
Nebraska Exposition Association v. Townley	893
SUBSCRIPTIONS. PAROL EVIDENCE. CORPORATIONS.	
Nichols v. State	715
BANKS AND BANKING DEPOSITS. OVERDRAFTS. EVIDENCE.	
Norfolk Nat. Bank v. Schwenk	381
USURY. ACTION FOR PENALTY. LIMITATION.	

TABLE OF CASES REPORTED. xxiii

O.

	PAGE
O'Chander v. State.....	10
CONTEMPT. APPEAL BOND. INJUNCTION.	
O'Connor v. State.....	157
PHYSICIANS AND SURGEONS. PRACTICE IN VIOLATION OF STATUTE. INFORMATION.	
Olsen v. Meyer.....	240
NEGLIGENCE. EVIDENCE.	
Omaha Loan & Trust Co. v. Hanson.....	870
USURY.	
Orgall v. Chicago, B. & Q. R. Co.....	4
DEATH BY WRONGFUL ACT. PLEADING. REVIEW.	
Otis v. Butters	492
UNAUTHENTICATED TRANSCRIPTS.	

P.

Parrotte, Johnson v.	51
Perkins v. Butler County	314
INSOLVENT PARTNERSHIP. RIGHTS OF CREDITORS.	
Pflueger v. State.....	493
JURY. HOMICIDE. INSANITY.	
Platte Valley Improvement Co., Hards v.....	709
Polk County, Heald v.....	28
Powell v. Yeazel.....	225
FRAUDULENT CONVEYANCES. EVIDENCE OF GOOD FAITH. SALES.	

R.

Raben, Warren v.....	115
Ragoss v. Cuming County.....	36
COUNTY CLERKS. FEES.	
Railroad Company, Chicago, B. & Q., Orgall v.....	4
Railroad Company, Chicago, K. & N., Blakely v.....	272
Railroad Company, Chicago, R. I. & P., v. Archer.....	907
Railroad Company, Fremont, E. & M. V., Board of Transportation v.....	682
Railroad Company, Sioux City, O'N. & W., Board of Transportation v.....	682
Railroad Company, Union P., v. Ray	750
Ramge, Sweeney v.....	919
Rauschkolb v. State.....	658
INDICTMENT AND INFORMATION. INDORSEMENT OF NAMES OF WITNESSES.	

xxiv TABLE OF CASES REPORTED.

	PAGE
Ray, Union P. R. Co. v.....	750
Redden, McCormac v.....	776
Redman v. Voss	512

TRIAL. INSTRUCTIONS.

Reed, Farrell v.....	258
Reed Bros. Co. v. First Nat. Bank of Weeping Water.....	168

INCORPORATION OF FAILING PARTNERSHIP. PARTNERSHIP

DEBTS. SALES.

Reid, Monroe v.....	316
Robertson, Keens v.....	837
Roper, Hocknell v.....	724, 730

S.

Scheel, Steen v.....	252
Schlesinger, Zittle v.....	844
School District Number One, Harlan County, v. Bishop.....	850

REFERENCE. FINDINGS. COURT RECORDS. CONTINUANCE.

Schwenk, Norfolk Nat. Bank v..	381
Shafer v. Briggs.....	445

REVIEW. INSTRUCTIONS. CRITICISM.

Sherman, Bartram v.....	713
Sioux City, O'N. & W. R. Co., Board of Transportation v.....	682
Smith v. Brown.....	230

ADMISSION OF EVIDENCE. ESTOPPEL. SALES.

INSTRUCTIONS.

Smith, Einspahr v.....	138
Smith, Wigton v.....	461
South Omaha Nat. Bank, Cady v.....	756
Spatz v. Martin.....	917

NEGOTIABLE INSTRUMENTS. SURETYSHIP.

Specht v. Stevens.....	874
------------------------	-----

MECHANICS' LIENS. CONTRACTS.

State, American Water-Works Co. v.....	194
State, Argabright v.....	822
State, Bowen v.....	23
State, Chambers v.....	447
State, Collins v.....	37
State, Conley v.....	187
State, Cooley v.....	603
State, Cooperrider v.....	84
State, Dixon v.....	298
State, Dobson v.....	250
State, Ford v.....	390
State, Galligher v.....	606
State, Griffen v.....	282

TABLE OF CASES REPORTED.

xxv

	PAGE
State, Grossman v.....	21
State, Hamilton v.....	284
State, Haskins v.....	888
State, Hawes v.....	149
State, Keeshan v.....	155
State, Korth v.....	631
State, Lamma v.....	236
State, Lawhead v.....	607
State, Lindsay v.....	177
State, McAleer v.....	116
State, McGinn v.....	427
State, McMahon v.....	166
State, Metz v.....	547
State v. Meyers.....	152

WITNESSES. INSANITY. RAPE.

State, Morearty v.....	652
State, Nichols v.....	715
State, O'Chander v.....	10
State, O'Connor v.....	157
State, Pflueger v.....	493
State, Rauschkolb v.....	658
State, Tracey v.....	361
State, Van Horn v.....	62
State, Walker v.....	25
State, Wendell v.....	823
State, Whitner v.....	144
State, Wilcox v.....	402
State, Williams v.....	704
State, Wood v.....	58
State, Zimmerman v.....	13
State, ex rel. Bartow, v. Eastman.....	675

ELECTIONS. RETURNS. DUTY OF CANVASSERS.

State, ex rel. Beer, v. Thayer.....	137
-------------------------------------	-----

CONTRACTS. SCHOOL LANDS.

State, ex rel. Berge, v. Lansing.....	514
---------------------------------------	-----

OFFICE AND OFFICERS. TIME TO QUALIFY. BONDS.

VACANCIES. ELECTIONS.

State, ex rel. Board of Regents of University of Nebraska, v. Moore.....	373
--	-----

VOUCHERS. CLAIMS AGAINST STATE UNIVERSITY.

State, ex rel. Board of Transportation, v. Sioux City, O'N. & W. R. Co.....	682
---	-----

CONSTITUTIONAL LAW. FEDERAL DECISIONS. STATE DECISIONS. STATUTES. RAILROAD COMPANIES. TRANSFER SWITCHES. COURTS.

xxvi TABLE OF CASES REPORTED.

	PAGE
State, ex rel. Franklin County, v. Vincent	408
FEES. CONSTITUTIONAL LAW. CLAIMS AGAINST COUNTIES.	
State, ex rel. Hocknell, v. Roper.....	724, 730
RELOCATION OF COUNTY SEAT. CONSTRUCTION OF STATUTE.	
ELECTIONS. MANDAMUS. PLEADING.	
State, ex rel. Hoffman, v. Moore.....	590
MUNICIPAL BONDS. ANTEDATE. MANDAMUS.	
State, ex rel. Horne, v. Holcomb.....	88
CONSTITUTIONAL LAW. INSTITUTION FOR THE BLIND.	
TRUSTEES.	
State, ex rel. Leidigh, v. Holcomb.....	612
CONSTITUTIONAL LAW. STATUTES. MANAGEMENT OF PENI-	
TENTIARY. WARDEN. BOARD OF PUBLIC LANDS AND	
BUILDINGS.	
State, ex rel. Murphy, Farris v.....	857
State, ex rel. Welty, v. McFadden.....	668
ELECTIONS. CANVASSERS OF RETURNS. MANDAMUS.	
Steen v. Scheel.....	252
LANDLORD AND TENANT. CONSTRUCTION OF LEASE.	
Stein, Baker v.....	682
Stevens, Cooperrider v.....	84
Stevens, Specht v.....	784
Storz v. Finklestein.....	577
CONTRACTS. PUBLIC POLICY. SALES.	
Stover, Hough v.....	588
Summers, Boyes v.....	308
Sweeney v. Range.....	919

REVIEW.

T.

Thayer, Beer v.....	137
Thesing, Bryant v.....	244
Thomas v. Carson.....	765
PLEADING. NAMES OF PARTIES. ABSTRACTS OF TITLE.	
STATUTORY BOND.	
Thomas, City Nat. Bank of Hastings v.....	861
Townley, Nebraska Exposition Association v.....	893
Tracey v. State.....	361
CRIMINAL LAW. MISCONDUCT OF JURY. EVIDENCE.	
ROBBERY. SENTENCE. INFORMATION.	
Tullock v. Webster County.....	211
BRIDGES. COUNTIES. CONTRACTS. ULTRA VIRES.	

TABLE OF CASES REPORTED. xxvii

U.

	PAGE
Union P. R. Co. v. Ray.....	750
RAILROAD COMPANIES. SETTING OUT FIRE. DAMAGES. INTEREST.	
University of Nebraska v. Moore.....	373

V.

Van Horn v. State.....	62
TOWNSHIPS. COUNTY BOARDS. STATUTES. MANDAMUS.	
Ver Bryck, Mayer v.....	221
Viergutz v. Aultman.....	141
ESTOPPEL. LIEN OF JUDGMENT.	
Vincent, Franklin County v.....	408
Voss, Redman v.....	512

W.

Walker, American Water-Works Co. v.....	194
Walker v. State	25
HOMICIDE. INSANITY.	
Warren v. Raben.....	115
ACCOUNTING. REFERENCE.	
Webster County, Tullock v.....	211
Welty v. McFadden.....	668
Wendell v. State.....	823
ARSON. ACCESSORIES. INFORMATION.	
Whitner v. State.....	144
CRIMINAL LAW. FAILURE TO TRY ACCUSED. DISCHARGE. INDICTMENT AND COMPLAINT. VARIANCE.	
Wigton v. Smith	461
ATTORNEY AND CLIENT. CONTRACT. PLEADING.	
Wilcox v. State.....	402
REFUSAL OF WITNESS TO BE SWORN. CONTEMPT. COMMITMENT.	
Williams v. State.....	704
INSTRUCTIONS. HOMICIDE. INSANITY. EVIDENCE.	
Wisherd, Deering v.....	720
Wolfe v. Kyd	292
SHERIFFS AND DEPUTY SHERIFFS. FEES. COUNTIES. PLEADING.	
Wood v. State.....	58
RAPE. EVIDENCE.	

xxviii TABLE OF CASES REPORTED.

Y.

	PAGE
Yeazel, Powell v.....	225

Z.

Zimmerman v. State.....	13
CONTEMPT. REVIEW. INFORMATION.	
Zittle v. Schlesinger.....	844
TRIAL. NONSUIT. REAL ESTATE AGENTS. COMMISSIONS.	

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE CRITICISED IN THIS VOLUME.
CASES MARKED ‡ ARE DISTINGUISHED IN THIS VOLUME.

A.

	PAGE
Abbott v. Morrisette, 48 N. W. Rep. (Minn.), 416.....	650
Ackerson v. Orchard, 7 Wash., 377.....	795
Aiken v. Blaisdell, 41 Vt., 655.....	586
Aiken v. State, 41 Neb., 263.....	607, 609
Albert v. Twohig, 35 Neb., 563.....	773
Albertson v. State, 9 Neb., 429.....	63, 77, 78, 268
Allen v. State, 10 O. St., 287.....	549
Ames v. Union P. R. Co., 64 Fed. Rep., 165.....	696
† Anderson v. Chicago, B. & Q. R. Co., 35 Neb., 95.....	4, 8
Anderson v. Coburn, 27 Wis., 558.....	744
Anderson v. Colson, 1 Neb., 172.....	735, 736
Anderton v. Shoup, 17 O. St., 126.....	260
Anthony v. Jasper County, 101 U. S., 693.....	592
Armil v. Chicago, B. & Q. R. Co., 30 N. W. Rep. (Ia.), 42.....	46
Armstrong v. Toler, 11 Wheat. (U. S.), 268.....	587
Arrowsmith v. Harmoning, 42 O. St., 254.....	791
Artman v. West Point Mfg. Co., 16 Neb., 572.....	52, 56
Asch v. Wiley, 16 Neb., 41.....	887
Atchafalaya Bank v. Dawson, 13 La., 497.....	526, 538
Atchison & N. R. Co. v. Washburn, 5 Neb., 117.....	764
Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S., 667.....	683, 699, 701
Atwood v. Atwater, 43 Neb., 147.....	133
Aultman, Miller & Co. v. Mallory, 5 Neb., 178.....	834, 835

B.

Bailey v. Pittsburg & Connellville Gas, Coal & Coke Co., 69 Pa. St., 334.....	350
Baker v. New York Nat. Exchange Bank, 100 N. Y., 31.....	763
Baldwin v. State, 12 Neb., 61.....	553

xxx CASES CITED BY THE COURT.

	PAGE
Ballard v. State, 19 Neb., 609	554
Banchor v. Mansel, 47 Me., 58	586
Bank of Fort Madison v. Alden, 129 U. S., 372	359
Bank of Genesee v. Patchin Bank, 19 N. Y., 312	868
Bank of State of New York v. Bank of the State of Ohio, 29 N. Y., 619	868
Bank of the Republic v. Millard, 10 Wall. (U. S.), 152	718
Bardwell v. Stubbett, 17 Neb., 485	571
† Barnes v. State, 40 Neb., 545.....	398
Barnett v. Pratt, 37 Neb., 349.....	247
Barnett v. Second Nat. Bank of Cincinnati, 8 Otto (U. S.), 555....	388
Barnett v. State, 83 Ala., 40	60
Barnum v. Young, 10 Neb., 309.....	918
Barr v. Chapman, 5 O. Cir. Ct., 69.....	331
Bartlett v. Hawley, 120 Mass., 92	260
Batchelder v. Moore, 42 Cal., 412.....	151
Bates v. Ryberg, 40 Cal., 463.....	269
Bayha v. Webster County, 18 Neb., 131.....	28, 30
Beaty v. State, 82 Ind., 228.....	287
Beckwith v. Philby, 6 Barn. & C. (Eng.), 635.....	126
Beech v. Abbott, 6 Vt., 586.....	747
Beekman v. Saratoga & S. R. Co., 3 Paige Ch. (N. Y.), 73.....	421
Bell v. Boyd, 13 S. W. Rep. (Tex.), 232	19
Bellingall v. Duncan, 3 Gilm. (Ill.), 477	468, 477
Bell's Appeal, 66 Pa. St., 498	788
Bennett v. Lycoming County Mutual Ins. Co., 67 N. Y., 274.....	474
Bennett v. State, 58 Miss., 556.....	527, 529
Bennett v. Whitney, 94 N. Y., 302	768
Bentley v. Davis, 21 Neb., 685	817
Benton v. McIntire, 15 Atl. Rep. (N. H.), 413.....	803
Berry v. Young, 15 Tex., 369.....	808
Bigler v. Baker, 40 Neb., 325.....	853
Bishop v. Stevens, 31 Neb., 786.....	764
Black v. Winterstein, 6 Neb., 224... ..	886
Blackwell v. Wright, 27 Neb., 269.....	385
Blanchard v. Blanchard, 3 Ired. (N. Car.), 105.....	798
Blenkiron v. State, 40 Neb., 11.....	542
Bloom v. Burdick, 1 Hill (N. Y.), 130	800
Boardman v. Reed, 31 U. S., 328.....	806
Bockover v. Life Association, 77 Va., 85.....	489
Bocock's Executor v. Alleghany Coal & Iron Co., 82 Va., 913.....	489
Bohanan v. State, 15 Neb., 209, 18 Neb., 57.....	442, 444, 887
Bond v. Dolby, 17 Neb., 491.....	328
Bonning v. Taylor, 24 Pa. St., 292.....	421
Bonorden v. Kriz, 13 Neb., 121.....	74
Booth v. Bunce, 88 Am. Dec. (N. Y.), 372.....	175

CASES CITED BY THE COURT.

xxxi

	PAGE
Bosworth v. Sturtevant, 2 Cush. (Mass.), 392.....	802
Botsch v. State, 43 Neb., 501.....	144, 147, 148
Boulton Carbon Co. v. Mills, 78 Ia., 460.....	350
Bowie v. Spaid, 26 Neb., 635.....	118
Boyd v. Cross, 35 Md., 194.....	128
Boyd v. State, 19 Neb., 128.....	12, 15, 151, 604
Boynton v. Andrews, 63 N. Y., 93.....	359
Bradford v. Justices' Inferior Court, 33 Ga., 336.....	193
Bradford v. Patten, 108 Mass., 153.....	257
† Bradley v. Fallbrook Irrigation District, 68 Fed. Rep., 948,	
	420, 421, 424
Bragdon v. Harmon, 69 Me., 29.....	768
Brabm v. Adkins, 77 Ill., 263.....	718
Branham v. Mayor of San Jose, 24 Cal., 585.....	199
Bray v. Adams, 114 Mo., 486.....	808
Breman Savings Bank v. Branch-Crookes Saw Co., 16 S. W. Rep.	
(Mo.), 209.....	175
Bressler v. Wayne County, 25 Neb., 468.....	682, 691
Briggs v. First Nat. Bank, 41 Neb., 17.....	918
Brondberg v. Babbott, 14 Neb., 517.....	157
Brookman v. Kurzman, 94 N. Y., 272.....	806
Brooks v. Martin, 2 Wall. (U. S.), 70.....	587
Brown v. Edgerton, 14 Neb., 453.....	56
Brown v. O'Brien, 4 Neb., 195.....	853
Brown v. Otoe County, 6 Neb., 111.....	35
Brown v. Parker, 7 Allen (Mass.), 337.....	260
Brown v. Rice, 30 Neb., 236.....	662
Brown v. Warren, 16 Nev., 228.....	797
Brown v. Williams, 34 Neb., 376.....	436
Browne v. Edwards & McCullough Lumber Co., 44 Neb., 361.....	715
Brownlee v. Davidson, 28 Neb., 785.....	855
Bryan v. Bauder, 23 Kan., 95.....	791
Bryant v. Thompson, 128 N. Y., 426.....	269
Buchanan v. Selden, 43 Neb., 559.....	207, 210
Budd v. New York, 143 U. S., 517.....	692
Buffalo County Nat. Bank v. Sharpe, 40 Neb., 123.....	918
Bunn v. People, 45 Ill., 400.....	193
Burger v. State, 34 Neb., 397.....	891
Burke v. Wheat, 22 Kan., 722.....	791
Burley v. Marsh, 11 Neb., 291.....	708
Burlingim v. Warner, 39 Neb., 497.....	328
Burlington & M. R. R. Co. v. Harris, 8 Neb., 140.....	764
Burlington & M. R. R. Co. v. Saunders County, 9 Neb., 507.....	73
Burlington & M. R. R. Co. v. Westover, 4 Neb., 263.....	752, 755
Burnett v. Burlington & M. R. R. Co., 16 Neb., 332.....	542
Burns v. City of Fairmont, 28 Neb., 866.....	394

xxxii CASES CITED BY THE COURT.

	PAGE
Burns v. Erben, 40 N. Y., 463	126, 128
Burtnett v. First Nat. Bank of Corunna, 38 Mich., 630	762
Byrd v. Blessing, 11 O. St., 362	847

C.

Camden v. Doremus, 3 How. (U. S.), 515	912
Camp v. Pollock, 45 Neb., 771.....	897, 899
Campbell v. Pope, 96 Mo., 468.....	176
Canal Elevator & Warehouse Co. v. Brown, 36 O. St., 660	256
Carleton v. State, 43 Neb., 373.....	167, 306, 864
Carlow v. Aultman, 28 Neb., 672	208
Carr v. State, 24 Tex. App., 562.....	501
Carruth v. Harris, 41 Neb., 789.....	708
Carter v. Glass, 44 Mich., 154.....	821
Case v. Hannahs, 2 Kan., 490.....	847
Casebeer v. Drahoble, 13 Neb., 465.....	4
Casey v. Chicago, St. P., M. & O. R. Co., 62 N. W. Rep. (Wis.), 624.....	562
Cass v. Dillon, 2 O. St., 608.....	106
Castillo v. State, 19 S. W. Rep. (Tex.), 892.....	44
Central Irrigation District v. De Lappe, 79 Cal., 351.....	417, 423
Central Loan & Trust Co. v. O'Sullivan, 44 Neb., 834	208, 210
Central Nat. Bank v. Connecticut Mutual Life Ins. Co., 104 U. S., 54.....	763
Central Nat. Bank v. Pratt, 115 Mass., 539.....	338
Chapin v. School District, 35 N. H., 445	275
Chaplin v. Lee, 18 Neb., 440	120, 121
Charlebois v. Gogebic & M. R. Co., 91 Mich., 59.....	8
Cheney v. Wagner, 30 Neb., 262	886
Chestnut v. Shane, 16 O., 599.....	94
Chetlain v. Republic Life Ins. Co., 86 Ill., 220.....	712
Chicago & G. T. R. Co. v. Wellman, 143 U. S., 339.....	692
Chicago, B. & Q. R. Co. v. Iowa, 94 U. S., 155.....	691
Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S., 418, 458, 683, 692, 693, 694, 695, 697	697
Childrey v. Rady, 77 Va., 518.....	527
Churchill v. Merchants Bank, 19 Pick. (Mass.), 532.....	436
City of Chadron v. Glover, 43 Neb., 733	291
City of Chester v. Black, 131 Pa. St., 568.....	425
City of Chicago v. Gage, 95 Ill., 593.....	521, 522, 536
City of Chicago v. Sansum, 87 Ill., 182	86
City of Denver v. Knowles, 17 Colo., 204.....	425
City of Lafayette v. James, 92 Ind., 240.....	629
City of Lincoln v. Beckman, 23 Neb., 677.....	708
City of Louisiana v. Wood, 102 U. S., 294.....	592

CASES CITED BY THE COURT. xxxiii

	PAGE
City of Louisville v. Kean, 18 B. Mon. (Ky.), 9.....	86
City of Plattsburgh v. Boeck, 32 Neb., 297.....	118
† City of Seward v. Klenk, 27 Neb., 615, 30 Neb., 775	863
City of Sterling v. Galt, 117 Ill., 11	425
City of St. Joseph v. Owen, 110 Mo., 445.....	425
City Bank of New Haven v. Perkin, 29 N. Y., 554.....	868
Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb., 798.....	415
Clark v. Ennis, 45 N. J. Law, 69.....	523, 525, 536
Clark v. Mullen, 16 Neb., 481.....	764
Clearwater Bank v. Kurkonski, 45 Neb., 1.....	314
Clemens v. Brillhart, 17 Neb., 335.....	359
Clements v. Henderson, 4 Ga., 148.....	800
Clendenning v. Perrine, 32 Neb., 155.....	600
Cleveland Paper Co. v. Banks, 15 Neb., 23.....	312
Coalfield Coal Co. v. Peck, 98 Ill., 139.....	360
Cobbey v. Burks, 11 Neb., 157.....	314
Coburn v. Coxeter, 51 N. H., 158.....	278
Cochran v. Toker, 14 Minn., 385.....	133
Coffelt v. State, 11 S. W. Rep. (Tex.), 639.....	370
Coffman v. Brandhoeffer, 33 Neb., 279.....	748
Cohens v. Virginia, 6 Wheat. (U. S.), 265.....	94
Coit v. Gold Amalgamating Co., 119 U. S., 343, 344.....	349, 359
Coler v. Cleburne, 131 U. S., 162.....	592
Collins v. State, 5 Tex. App., 38.....	396
Colorado C. R. Co. v. Ogden, 3 Colo., 499.....	565
Commercial Nat. Bank v. Nebraska State Bank, 33 Neb., 292...598, 599	
† Commissioners of Knox County v. Johnson, 124 Ind., 145; 24 N. E. Rep., 148.....	525, 526, 538
Commissioners of Marion County v. Clark, 94 U. S., 278.....	593
Commonwealth v. City of Pittsburgh, 34 Pa. St., 496.....	86
Commonwealth v. Jacobs, 25 N. E. Rep. (Mass.), 463.....	640
Commonwealth v. Maxwell, 3 Casey (Pa.), 444.....	437
Commonwealth v. Werntz, 29 Atl. Rep. (Pa.), 272.....	44
Conn v. Scruggs, 5 Baxt. (Tenn.), 567.....	260
Connell v. Galligher, 36 Neb., 749, 39 Neb., 793	372
Connelly v. Edgerton, 22 Neb., 82.....	394
Cooley v. State, 46 Neb., 603.....	607
Coon v. Fry, 6 Mich., 506.....	795
Cooper v. Nelson, 38 Ia., 440.....	87
Cooper v. Reynolds, 10 Wall. (U. S.), 308.....	745, 746, 747
Cooper v. Robinson, 2 Cush. (Mass.), 184.....	795
Cooper v. Utterbach, 37 Md., 282.....	128
Coops v. Lake S. & M. S. R. Co., 66 Mich., 448.....	8
Corry v. Fleming, 29 O. St., 149.....	263
Coster v. Tide Water Co., 18 N. J. Eq., 54, 518	421

xxxiv CASES CITED BY THE COURT.

	PAGE
Cowan v. State, 22 Neb., 519.....	147
Cox v. Hart, 145 U. S., 376.....	797
Crall v. Poso Irrigation District, 87 Cal., 140.....	418
Crane v. Larsen, 15 Ore., 349.....	331
Crawford v. Howard, 9 Ga., 314.....	521
Crawford v. Rohrer, 59 Md., 599.....	350
Creighton v. Commonwealth, 83 Ky., 142.....	520
Crow v. State, 21 S. W. Rep. (Tex.), 543.....	47
Crowell v. Johnson, 2 Neb., 146.....	740, 743, 744
Crowley v. Goll, 27 S. W. Rep. (Tex.), 879.....	797
Cullmans v. Lindsay, 6 Atl. Rep. (Pa.), 332.....	247
Culver v. Rodgers, 33 O. St., 546.....	816
Curran v. Clayton, 86 Me., 42.....	776
Curran v. Percival, 21 Neb., 434.....	542
Cutrier v. Henderson, 85 Hun (N. Y.), 300.....	913
Curtin v. Atkinson, 36 Neb., 115.....	108
Curtis v. Allen, 43 Neb., 184.....	101

D.

Dalton v. State, 43 O. St., 652.....	674
Davidson v. New Orleans, 96 U. S., 97.....	421
Davies v. City of Los Angeles, 86 Cal., 37.....	423
Davis v. City of Litchfield, 145 Ill., 313.....	425
Davis v. First Nat. Bank of Cheyenne, 5 Neb., 242.....	918
Davis v. Panhandle Nat. Bank, 29 S. W. Rep. (Tex.), 926.....	762
Davis v. Randall, 115 Mass., 547.....	388
Davis v. Russell, 5 Bing. (Eng.), 354.....	126
Davis v. Smith, 27 Minn., 390.....	763
Davis v. State, 31 Neb., 243, 247, 248, 252.....	15, 16, 154
Davis v. Touchstone, 45 Tex., 490, 491.....	791, 799
† Dawkins v. State, 58 Ala., 376.....	448, 449
Dean v. Davis, 51 Cal., 410.....	423
Deardorff v. Foresman, 24 Ind., 481.....	544
De Bardelaben v. Stoudenmire, 48 Ala., 643.....	800
Debney v. State, 45 Neb., 856.....	167, 177, 182
Dee v. State, 9 So. Rep. (Miss.), 356.....	165
Dewey v. Allgire, 37 Neb., 6.....	499
‡ Dickey v. Paterson, 45 Neb., 848.....	412, 425
Dignan v. Spurr, 28 Pac. Rep. (Wash.), 529.....	247
Dill v. Inhabitants of Wareham, 7 Met. (Mass.), 438.....	582
Dixon v. State, 26 S. W. Rep. (Tex.), 500.....	656
Dixon County v. Barnes, 13 Neb., 294.....	35
Dob v. Halsey, 16 Johns. (N. Y.), 34.....	763
Dobson v. State, 46 Neb., 250.....	554, 556, 891
Dodge v. Kiene, 28 Neb., 216.....	896

CASES CITED BY THE COURT. xxxv

	PAGE
Dodge v. People, 4 Neb., 220, 222.....	283, 284, 366
Doe v. Martin, 4 T. R. (Eng.), 65	625
Doering v. State, 49 Ind., 56.....	126
Doll v. Crume, 41 Neb., 655.....	648, 649
Douglas County v. Timme, 32 Neb., 272	410
Dow v. Beidelman, 125 U. S., 680, 689.....	692
Dows v. Town of Elmwood, 34 Fed. Rep., 114.....	593
Dreyfus v. Moline, Milburn & Stoddard Co., 43 Neb., 233.....	858
Driesbach v. Second Nat. Bank of Wilkes Barre, 14 Otto (U.S.), 52,	388
Ducket v. Skinner, 11 Ired. (N. Car.), 431.....	791
Duckworth v. Johnson, 4 Hurl. & N. (Eng.), 653.....	8
Dunbier v. Day, 12 Neb., 596.....	706
Dunphy v. Whipple, 25 Mich., 10	521

E.

Eanes v. State, 6 Humph. (Tenn.), 53.....	126
Eckman v. Scott, 34 Neb., 817.....	918
Edgar v. Keller, 43 Neb., 263.....	662
Edney v. Baum, 44 Neb., 294.....	183
Ellis v. First Nat. Bank of Olney, 11 Brad. (Ill.), 275.....	665
Ellis' Case, 8 N. J. Law, 286.....	436
Elmore v. Grymes, 1 Pet. (U. S.), 469.....	846
Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 9 So. Rep. (Ala.), 129; 92 Ala., 407.....	349, 350
Episcopal Charitable Society v. Episcopal Church in Dedham, 1 Pick. (Mass.), 371.....	583
Estate of Wright, 49 Cal., 550.....	269
Estell v. State, 17 Atl. Rep. (N. J.), 118.....	47
Evans v. Snyder, 64 Mo., 516	788
Exeter Nat. Bank v. Orchard, 39 Neb., 485.....	387
† Ex parte Candee, 48 Ala., 386.....	523, 527
Ex parte Wright, 65 Ind., 508.....	605
Express Cases, 117 U. S., 1.....	683, 699, 700, 703

F.

Falconer v. Shores, 37 Ark., 386.....	523, 524, 527
Farmers & Mechanics Bank v. Butchers & Drovers Bank, 14 N. Y., 623, 16 N. Y. 125.....	868
Farmers & Mechanics Bank of Mercer v. Hoagland, 7 Fed. Rep., 159.....	388
Farmers & Mechanics Nat. Bank v. Dearing, 1 Otto (U. S.), 29 ...	387
Farmers Loan & Trust Co. v. Killinger, 46 Neb., 677.....	682
Farmers Loan & Trust Co. v. St. Joseph & D. C. R. Co., 1 Mc- Crary (U. S.), 247.....	584
Farwell v. St. Paul Trust Co., 45 Minn., 495.....	763

xxxvi CASES CITED BY THE COURT.

	PAGE
Feild v. Dortch, 34 Ark., 399.....	747
Filer v. Smith, 96 Mich., 347; 55 N. W. Rep., 999.....	126, 128
Fire Association v. Fleming, 3 S. E. Rep. (Ga.), 420.....	133
Firestone v. Rice, 71 Mich., 377.....	126, 135
First Nat. Bank of Clarion v. Gruber, 8 W. N. C. (Pa.), 119; 91 Pa. St., 377.....	665
First Nat. Bank of Dorchester v. Smith, 36 Neb., 199.....	381
First Nat. Bank of Madison v. Carson, 30 Neb., 104.....	912
First Nat. Bank of Peterborough v. Childs, 133 Mass., 248.....	665
First Nat. Bank of South Bend, Indiana, v. Gandy, 11 Neb., 431...	719
Fisher v. Beard, 32 Ia., 346.....	510
Fisher v. City of Charleston, 17 W. Va., 595.....	86
Fitzgerald v. Meyer, 25 Neb., 77.....	229
Fitzgerald v. State, 11 Neb., 577.....	37, 42
Flagg v. Cooper, 54 N. Y. Supr. Ct., 50.....	680
Flagg v. Mayor of City of Palmyra, 33 Mo., 440.....	593
Flaten v. City of Moorhead, 53 N. W. Rep. (Minn.), 807.....	277
Foley v. Holtry, 43 Neb., 133.....	821
Foot v. Stiles, 57 N. Y., 399.....	529, 538
Ford v. State, 46 Neb., 390.....	607, 610
Foster v. Thurston, 11 Cush. (Mass.), 322.....	586
Foulke v. San Diego & G. S. P. R. Co., 51 Cal., 365.....	584
Frame v. Badger, 79 Ill., 441.....	706
Franklin v. Kelly, 2 Neb., 79.....	682, 691
Franklin v. South E. R. Co., 3 Hurl. & N. (Eng.), 213.....	8
Freeman v. Berkey, 48 N. W. Rep. (Minn.), 194.....	650
Fremont, E. & M. V. R. Co. v. Marley, 25 Neb., 138.....	751, 755
French v. Griffin, 10 S. E. Rep. (N. Car.), 166.....	650
French v. Price, 24 Pick. (Mass.), 13.....	260
Frey v. Clifford, 44 Cal., 335.....	797
Fulcher v. State, 13 S. W. Rep. (Tex.), 750.....	44
Furst v. State, 31 Neb., 403.....	500

G.

Gage County v. Wilson, 38 Neb., 165, 168.....	293, 294, 297, 298
Gallagher v. Giddings, 33 Neb., 222.....	849
Gandy v. State, 10 Neb., 243, 13 Neb., 445, 24 Neb., 723, 15, 88, 604, 605, 606, 661	
Gapen v. Bretternitz, 31 Neb., 302.....	56
Garrison v. People, 6 Neb., 274.....	855
Gas Light Co. of Baltimore v. Colliday, 25 Md., 1.....	202
* Gee Wo v. State, 36 Neb., 241.....	158, 161, 164
George v. State, 44 Neb., 757.....	117
Gibson v. Erie R. Co., 63 N. Y., 449.....	562
Gilbert v. Merriam & Robertson Saddlery Co., 26 Neb., 191.....	118

CASES CITED BY THE COURT. xxxvii

	PAGE
Gilchrist v. Shackelford, 72 Ala., 7.....	791
Gilmore v. Hentig, 33 Kan., 170.....	423
Glaze v. Parcel, 40 Neb., 732.....	291, 312
Glore v. Hare, 4 Neb., 132.....	436
Goforth v. Longworth, 4 O., 129.....	788
Goodrich v. City of Omaha, 11 Neb., 204.....	887
Gould v. Kendall, 15 Neb., 549.....	587
Graham v. Campbell, 56 Ga., 258.....	260
Gran v. Houston, 45 Neb., 813.....	864
Grand Island Banking Co. v. Costello, 45 Neb., 119.....	228
Grant v. Cropsey, 8 Neb., 205.....	143
Graves v. Scoville, 17 Neb., 593.....	887
Grebe v. Jones, 15 Neb., 312.....	742, 743, 744
Greene v. Briggs, 1 Curt. (U. S.), 311.....	421
Greene v. Greene, 42 Neb., 634.....	204, 206
Gregg v. Loomis, 22 Neb., 174.....	223
Gregory v. Langdon, 11 Neb., 166.....	912
Gregory v. Tingley, 18 Neb., 318.....	190
Grentzinger v. State, 31 Neb., 460.....	251
Groat v. Pracht, 31 Kan., 658.....	817
Gross v. Fowler, 21 Cal., 393.....	438
Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co., 139 U. S., 137.....	436, 437
Gulick v. Webb, 41 Neb., 706.....	819
Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb., 775.....	211, 218
Gyger's Estate, 65 Pa. St., 311.....	625

H.

Hagan v. State, 52 Ala., 373.....	552
Hagar v. Reclamation District, 111 U. S., 701.....	423
Hagge v. State, 10 Neb., 51.....	672, 736
Hall v. Aitkin, 25 Neb., 360.....	914
Hall v. Bradbury, 40 Conn., 32.....	260
Hall v. First Nat. Bank of Fairfield, 30 Neb., 99.....	385, 387
Hamilton v. Smith, 39 Mich., 222.....	128
Hamilton v. Thrall, 7 Neb., 210.....	896
Hammock v. Loan & Trust Co., 105 U. S., 77.....	625
Hammond v. State, 39 Neb., 252.....	146
Hampton v. Levy, McCord (S. Car.), 107.....	521
Hancock v. Fairfield, 30 Me., 299.....	260
Hannon v. State, 70 Wis., 448.....	154
Hansen v. Kirtley, 11 Ia., 565.....	719
Hardin v. Lee, 51 Mo., 241.....	747
Hardy v. Ryle, 9 Barn. & C. (Eng.), 603.....	438

xxxviii CASES CITED BY THE COURT.

	PAGE
Harris v. Broiles, 22 S. W. Rep. (Tex.), 421.....	797
Harris v. Lester, 80 Ill., 307	795
Hart v. State, 14 Neb., 572	308
Harvey v. Mitchell, 31 N. H., 575.....	803
Haskins v. Lombard, 16 Me., 140	544
Haslett v. Wotherspoon, 1 Strob. Eq. (S. Car.), 209	175
Hastings & G. I. R. Co. v. Ingalls, 15 Neb., 123	312
Hastings School District v. Caldwell, 16 Neb., 68	461, 465
Havemeyer v. Paul, 45 Neb., 373.....	870
Hawes v. State, 46 Neb., 149	405, 604
Haynes v. Brown, 36 N. H., 545.....	351
Hays v. Mercier, 22 Neb., 656.....	887
† Haywood v. Collins, 60 Ill., 328	746
Head v. State, 43 Neb., 30.....	61
Heald v. Polk County, 46 Neb., 28.....	36, 37, 408, 410
Heilbut v. Nevill, 4 L. R., C. P. (Eng.), 354.....	763
Heldt v. State, 20 Neb., 492, 496.....	120, 500, 553, 610
Henderson v. Hunter, 59 Pa. St., 335.....	278, 279
Hendricks v. State, 9 S. W. Rep. (Tex.), 535.....	656
Henry v. Whitaker, 17 S. W. Rep. (Tex.), 509.....	797
Henshall v. Roberts, 5 East (Eng.), 150.....	768
Hern v. Nichols, 1 Salk. (Eng.), 289.....	867
Hervey v. Edens, 6 S. W. Rep. (Tex.), 306	797
Hewitt v. Eisenbart, 36 Neb., 794	49
Hiatt v. Parker, 29 Kan., 765.....	816
Higley v. First Nat. Bank of Beverly, 26 O. St., 75	388
Hill v. Boyland, 40 Miss., 625.....	192
Hill v. State, 42 Neb., 503	37, 41, 120, 147, 304, 306, 400, 864
Hoagland v. Way, 35 Neb., 387.....	855
Hodgin v. Barton, 23 Kan., 740.....	791
Holley v. Mix, 3 Wend. (N. Y.), 350	126
Hollister v. Judges of District Court, 8 O. St., 201.....	86
Holman v. Johnson, 1 Cowper (Eng.), 343	586
Holman v. State, 105 Ind., 513.....	150, 151
Holmberg v. Hauck, 16 Neb., 337	73
Holton v. Parker, 13 Minn., 355.....	768
Home Fire Ins. Co. of Omaha v. Johnson, 43 Neb., 71.....	837, 841
Hooker v. De Palos, 28 O. St., 251.....	586
Hopkins v. Scott, 38 Neb., 661.....	76
† Horn v. Queen, 5 Neb., 472.....	138, 140
Hornbeck v. State, 35 O. St., 277.....	152, 154
Hosford v. Stone, 6 Neb., 378.....	854
Houghton v. First Nat. Bank of Elkhorn, 26 Wis., 663.....	867
Howard v. Moore, 2 Mich., 226.....	791, 795
Howson v. Hancock, 8 T. R. (Eng.), 577.....	581
Hoy v. Anderson, 39 Neb., 386.....	143

CASES CITED BY THE COURT. xxxix

	PAGE
Hoyt v. Utah, 104 U. S., 631.....	400
Hubbard v. Draper, 14 Neb., 500.....	904
Hubbell v. Flint, 13 Gray (Mass.), 287.....	586
Huggins v. Citizens Nat. Bank of Kansas City, 24 S. W. Rep. (Tex.), 926	388
Hull v. Chicago, B. & Q. R. Co., 21 Neb., 371.....	282
Hull v. Ruggles, 56 N. Y., 424.....	586
Hunter v. Silvers, 15 Ill., 174.....	255
Hunter v. State, 14 Neb., 506.....	736
Huntington v. Gault, 81 Mich., 155	128
Hurford v. City of Omaha, 4 Neb., 336.....	527
Hurst v. Detroit City R. Co., 84 Mich., 539.....	4, 8
Hyatt v. Dusenbury, 106 N. Y., 663.....	269

I.

Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co., 7 Sup. Ct. Rep., 542.....	176
Inman v. West Fire Ins. Co., 12 Wend. (N. Y.), 452.....	474
In re Bergin, 31 Wis., 386.....	206
In re Board of Public Lands & Buildings, 37 Neb., 425.....	629
In re Bonds of Madera Irrigation District, 92 Cal., 296.....	418, 423
In re Clark, 3 Denio (N. Y.), 167.....	747
In re Daves, 81 N. Car., 72.....	605
In re Franklin Bank, 1 Paige Ch. (N. Y.), 249.....	718
In re Fuller, 34 Neb., 581.....	443
In re Holt, 27 Atl. Rep. (N. J.), 909.....	605
In re Office of Attorney General, 14 Fla., 277.....	527
In re Scheidler's Estate, 27 N. Y. Sup., 7.....	271
In re Scott, 38 Neb., 502.....	23
In re South Mountain Consolidated Mining Co., 7 Sawy. (U. S.), 32,	347
In re Tyson, 13 Colo., 482.....	443
In re Vote Marks, 17 R. I., 812.....	776
In re Walsh, 37 Neb., 451.....	284
Ives v. Norris, 13 Neb., 252.....	73

J.

Jackson v. Gilchrist, 15 Johns. (N. Y.), 89.....	625
Jackson v. State, 76 Ga., 473; 66 Miss., 89	239
Jackson v. Trader, 64 Ia., 469.....	350
Jackson v. Washington County, 34 Neb., 680.....	94
Jenkins v. Mitchell, 40 Neb., 664.....	542
Johns v. Marsh, 9 The Rep. (Md.), 143.....	128
Johnson v. Bouton, 35 Neb., 903.....	12, 15, 151, 604
Johnson v. McClary, 131 Ind., 105.....	763
Johnson v. Parrotte, 23 Neb., 232, 46 Neb., 51.....	54, 56, 140

Johnston v. Milwaukee & Wyoming Investment Co., 46 Neb., 480.....	459
Jones v. Null, 9 Neb., 254.....	886
Jones v. Van Bochove, 61 N. W. Rep. (Mich.), 342.....	277, 280
Jones v. Wolfe, 42 Neb., 272.....	288, 291, 861, 863

K.

Kansas City & O. R. Co. v. Frey, 30 Neb., 790.....	75
Kansas City, W. & N. W. R. Co. v. Conlee, 43 Neb., 121.....	837, 841
Kearney v. Andrews, 10 N. J. Eq., 70.....	529
Kearney County v. Kent, 5 Neb., 227.....	394
Kearney Electric Co. v. Laughlin, 45 Neb., 390.....	567
Keegan v. Western Railroad Corporation, 8 N. Y., 175.....	565
Keens v. Gaslin, 24 Neb., 310.....	817
Kellett v. Rathbun, 4 Paige Ch. (N. Y.), 102.....	269
Kelley v. Vincent, 8 O. St., 415.....	467, 472
Kemerer v. State, 7 Neb., 130.....	28, 31
Kendal v. Wood, 6 L. R. Ex. (Eng.), 243.....	763
Kennedy v. Merrick, 46 Neb., 260.....	271
Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co., 37 Fed. Rep., 567.....	699
Kersenbrock v. Martin, 12 Neb., 374.....	708
King v. Godwin, Douglas (Eng.), 398.....	529
† King v. Harrington, 14 Mich., 532.....	744, 746
King v. State, 5 So. Rep. (Miss.), 97.....	47
Knight v. Ferris, 6 Houst. (Del.), 283.....	87
Knox v. Haug, 48 Minn., 58.....	500
Knox v. Williams, 24 Neb., 630.....	385, 897, 899
Koch v. Losch, 31 Neb., 625.....	143
Korsmeyer Plumbing & Heating Co. v. McClay, 43 Neb., 649.....	649
Kottman v. Ayer, 3 Strob. (S. Car.), 92.....	521
Krigel v. Bartling, 23 Neb., 852.....	150
Kruger v. Adams & French Harvester Co., 9 Neb., 526.....	143

L.

Lacon v. Hooper, 6 T. R. (Eng.), 224.....	436
* La Flume v. Jones, 5 Neb., 256.....	468, 475, 476
Lake Erie & W. R. Co. v. Ziebarth, 33 N. E. Rep. (Ind.), 256.....	277
Lake Superior Iron Co. v. Drexel, 90 N. Y., 87.....	359
Lamb v. State, 40 Neb., 312.....	611
Lamberton v. State, 11 O., 284.....	165
Langford v. State, 32 Neb., 782.....	609
Lanham v. First Nat. Bank of Crete, 46 Neb., 663.....	668
† Larson v. Dickey, 39 Neb., 463.....	412, 425
Lawson v. Gibson, 18 Neb., 137.....	901, 907

CASES CITED BY THE COURT.

xli

	PAGE
Leach v. Sutphen, 11 Neb., 527	858, 887
Leary v. Fletcher, 1 Ired. (N. Car.), 259	791
Lebanon Nat. Bank v. Karmany, 98 Pa. St., 65.....	665
Lee v. Smart, 45 Neb., 318.....	557, 566, 567
Leggate v. Clark, 111 Mass., 308.....	500
Leonard v. State, 7 Tex. App., 417.....	287
Lessee of Allen v. Lyons, 2 Wash. C. C. (U. S.). 475.....	804
Lester v. Garland, 15 Ves. Ch. (Eng.), 248.....	437
Leucke v. Tredway, 45 Mo. App., 507.....	350
Lewis v. Commissioners of Marshall County, 16 Kan., 102.....	672
Lewis v. Connolly, 29 Neb., 222.....	572, 573
Lewis v. State, 15 S. W. Rep. (Tex.), 642	44
Light v. Kennard, 11 Neb., 129	853
Lightfoot v. Tenant, 1 Bos. & P. (Eng.), 551	586
Lipscomb v. Lyon, 19 Neb., 511.....	394
Litchfield v. Flint, 104 N. Y., 543	768
Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. Rep., 559	699
Lloyd v. Washington Gas Light Co., 1 Mackey (D. C.), 331	202
Lloyd v. Wykoff, 11 N. J. Law, 218	467, 472
Lombard v. Mayberry, 24 Neb., 679	544
Long v. State, 17 Neb., 61, 23 Neb., 33.....	672, 708
Loomis v. Building Association, 37 O. St., 392	680
Loring v. Halling, 15 Johns. (N. Y.), 19	436
Lowe v. City of Omaha, 33 Neb., 587	313
Lowe v. Riley, 41 Neb., 812	182
Luce v. Foster, 42 Neb., 818	587
Ludes v. Hood, 29 Kan., 49.....	328
Ludlow v. Culbertson Park, 4 O., 5	788
Lyman v. City of Lincoln, 38 Neb., 794	649
Lyon v. Rice, 41 Conn., 245.....	87

M.

McBee v. Hoke, 2 Spears (S. Car.), 138*	521
McCann v. McLennau, 2 Neb., 286	268
McClain v. Cherokee Iron Co., 58 Ga., 233	571
McClelland v. Scroggin, 35 Neb., 536.....	835
McClure v. Heirs of Sheek, 4 S. W. Rep. (Tex.), 552.....	837, 839, 856
McCormick v. Stevenson, 13 Neb., 70	835
McCready v. Phillips, 44 Neb., 790	706
McCreery v. Day, 6 L. R. A. (N. Y.), 503	247
McDonald v. Aufdengarten, 41 Neb., 40	867
McDonald v. Grabow, 46 Neb., 406	492
McDuffie v. Bentley, 27 Neb., 380	817
McElhanon v. Washington County, 54 Ill., 163.....	521

xlii CASES CITED BY THE COURT.

	PAGE
McElwee Mfg. Co. v. Trowbridge, 62 Hun (N. Y.), 471	175
McEvoy v. Hussey, 64 Ga., 314	571
McGavock v. Pollack, 13 Neb., 535	440
McGhee v. First Nat. Bank of Tobias, 40 Neb., 92	386
McGiun v. State, 46 Neb., 427.....	409
McGuire v. Ulrich, 2 Abb. Pr. (N. Y.), 28.....	437
McJunkins v. State, 10 Ind., 140.....	549
McKeever v. Ball, 71 Ind., 398.....	794
McKinnell v. Robinson, 3 M. & W. (Eng.), 434.....	586
McMabon v. State, 46 Neb., 166.....	177, 183
McMillan v. Malloy, 10 Neb., 235.....	351
McMurtry v. Tuttle, 13 Neb., 232.....	901, 906
McReady v. Rogers, 1 Neb., 124.....	512, 513
McWhirter v. Allen, 20 S. W. Rep. (Tex.), 1007.....	797
Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 73 N. Y., 82.....	584
Magee v. Board of Supervisors, 38 Wis., 247.....	768
Manchester & L. R. Co. v. Concord R. Co., 20 Atl. Rep. (N. H.), 383.....	580, 587
Manufacturers Nat. Bank of Newark v. Dickerson, 41 N. J. Law, 448.....	629
Marbury v. Madison, 1 Cranch (U. S.), 137.....	82
Marine Bank v. Fulton Bank, 2 Wall. (U. S.), 252.....	718
Marion v. State, 20 Neb., 233.....	708
Markel v. Moudy, 11 Neb., 213.....	703
Marriage v. Lawrence, 3 B. & Ald. (Eng.), 142....	351
Marsh v. Burley, 13 Neb., 261.....	742
Marsh v. Smith, 49 Ill., 396.....	126
Martin v. Miles, 40 Neb., 135.....	773
Marvin v. Schilling, 12 Mich., 356.....	795
Mason v. White, 11 Barb. (N. Y.), 173.....	803
Masten v. Olcott, 101 N. Y., 152.....	803
Masters v. Marsh, 19 Neb., 458.....	394
Mathews v. State, 19 Neb., 330, 337.....	154, 394
Matter of Daniel Wood, 1 Hopk. Ch. (N. Y.), 8.....	193
Mauarr v. Parrish, 26 O. St., 636.....	808
Mayer v. Ver Bryck, 46 Neb., 221.....	466
Mayor v. Lord, 9 Wall. (U. S.), 409.....	86
Mayor of Indianapolis v. Geisel, 19 Ind., 344.....	525
† Mead v. State, 25 Neb., 444.....	398
Medley, Petitioner, 134 U. S., 160	444
Meehan v. First Nat. Bank of Fairfield, 44 Neb., 213.....	864
Melvin v. Proprietors of Locks & Canals, 5 Met. (Mass.), 15..	804, 806
Merriam v. Rockwood, 47 N. H., 81.....	544
Merritt v. Borden, 2 Dis. (O.), 503.....	475
Merritt v. Seaman, 6 N. Y., 163.....	768

CASES CITED BY THE COURT. xliii

	PAGE
Methard v. State, 9 O. St., 363.....	555
Metz v. State, 46 Neb., 547.....	891
Meyer v. Lane, 40 Kan., 491.....	572
Middle Kittitas Irrigation District v. Peterson, 29 Pac. Rep. (Wash.), 995.....	420
Migotti v. Colvill, 4 L. R., C. P. D. (Eng.), 233.....	436, 438
Millar v. Babcock, 29 Mich., 526.....	744
Miller v. Wheeler, 33 Neb., 765.....	738
Mills v. Miller, 4 Neb., 441.....	896
Milward v. Thatcher, 2 T. R. (Eng.), 81.....	529
Milwaukee & Wyoming Investment Co. v. Johnston, 35 Neb., 554...	485
Minard v. Burtis, 83 Wis., 267.....	437, 439
Minneapolis Harvester Works v. Hedges, 11 Neb., 46.....	887
Minor v. Lumpkin, 29 S. W. Rep. (Tex.), 799.....	797
Missouri P. R. Co. v. Baier, 37 Neb., 235.....	45, 48, 49
Missouri P. R. Co. v. Baxter, 42 Neb., 793.....	562
Missouri P. R. Co. v. Hall, 66 Fed. Rep., 868.....	913
Missouri P. R. Co. v. Hays, 15 Neb., 224.....	853
Modesto Irrigation District v. Tregea, 88 Cal., 334.....	418
Moffat v. Dickson, 3 Colo., 313.....	467, 474
Mohr v. Porter, 8 N. W. Rep. (Wis.), 364.....	795
Monell v. Terwilliger, 8 Neb., 360.....	440
Monroe v. Reid, 46 Neb., 316.....	900, 902
Montgomery Furniture Co. v. Hardaway, 16 So. Rep. (Ala.), 29...	491
Montour v. Purdy, 11 Minn., 278.....	791, 795
Moore v. Hubbard, 45 Neb., 612.....	291
Moore v. State, 20 S. W. Rep. (Tex.), 563.....	44
Moore v. Waterman, 40 Neb., 498.....	407, 492
Mordhorst v. Nebraska Telephone Co., 28 Neb., 610.....	764
Moreland v. Brady, 8 Ore., 303.....	803
Morris v. Merrell, 44 Neb., 423.....	511
Morrow v. Sullender, 4 Neb., 374.....	886
Mosher v. Griffin, 51 Ill., 184.....	586
Moulton v. Gage, 138 Mass., 390.....	562
Mulhern v. Union P. R. Co., 2 Wyo., 465.....	847
Murphey v. State, 43 Neb., 31.....	148
Murphy v. Gould, 40 Neb., 728.....	777
Murphy v. State, 15 Neb., 383.....	401
Musser v. King, 40 Neb., 892.....	897, 899
Mutual Nat. Bank v. Richardson, 33 La. Ann., 1312.....	764
Myers v. McGavock, 39 Neb., 843.....	810

N.

Nat. Bank of Auburn v. Lewis, 81 N. Y., 15.....	665
Nat. Bank of Fayette County v. Dushane, 9 W. N. C. (Pa.), 472; 96 Pa. St., 340.....	665

xliv CASES CITED BY THE COURT.

	PAGE
Nat. Tube Works Co. v. Gilfillan, 124 N. Y., 302.....	350
Nebraska Loan & Trust Co. v. Hamer, 40 Neb, 281,	
467, 472, 901, 903,	905
Nelson v. Hurford, 11 Neb., 465.....	385
Newcomb v. Smith, 5 O., 448.....	788
New England Screw Co. v. Bliven, 3 Blatch. (U. S.), 240.....	330
Newlove v. Woodward, 9 Neb., 502.....	858, 887
Newman v. Mueller, 16 Neb., 523	143
New Orleans Gas Light Co. v. Paulding, 12 Rob. (La.), 378	202
Niland v. Kalish, 37 Neb., 47.....	206
Noakes v. People, 25 N. Y., 380.....	656
Norfolk Nat. Bank v. Schwenk, 46 Neb., 381.....	664, 665
North River Bank v. Aymar, 3 Hill (N. Y.), 262.....	868
Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Es- tate Co., 46 Fed. Rep., 22.....	350, 351
Norton v. Pilger, 30 Neb., 860	835, 836
Nowotny v. Blair, 32 Neb., 175.....	542

O.

Oberfelder v. Kavanaugh, 29 Neb., 427	394
Oberne v. Burke, 30 Neb., 581.....	457, 459
O'Chander v. State, 46 Neb , 10.....	15
O'Donohue v. Hendrix, 13 Neb., 255	859, 887
Ogilvy v. Union P. R. Co., 18 Neb., 638	157
Ohio Nat. Bank v. Cook, 38 O. St., 442	260
Olcott v. Supervisors of Fond du Lac County, 16 Wall. (U. S.), 618, 420	
Oldenheimer v. Tressel, 43 N. W. Rep. (Dak.), 941	328
Oldham v. First Nat. Bank of Wilmington, 85 N. Car., 240.....	665
Oleson v. State, 11 Neb., 276	60, 152, 154
Olive v. State, 11 Neb., 1	181, 402, 611
Olson v. Neal, 63 Ia., 214	4
Omaha & R. V. R. Co. v. Brady, 39 Neb., 27	916
Omaha & R. V. R. Co. v. Brown, 14 Neb., 170	281, 282
Omaha Fair & Exposition Association v. Missouri P. R. Co., 42 Neb., 105	707, 750, 752, 754
Omaha S. R. Co. v. Beeson, 36 Neb., 361	280
Opinion of Judges, 126 Mass., 551.....	94
Osgood v. King. 42 Ia., 478.....	348, 350
Overton v. Cranford, 7 Jones Law (N. Car.), 415.....	795
Owens v. O'Brien, 78 Va., 116	527

P.

Packard v. Richardson, 17 Mass., 143.....	94
Paine v. Mooreland, 15 O., 435.....	744, 747

CASES CITED BY THE COURT.

xliv

	PAGE
Palin v. State, 38 Neb., 862	447, 448, 449
Palmer v. People, 4 Neb., 68.....	542
Palmer v. Witcherly, 15 Neb., 93	394
Parks v. Loomis, 6 Gray (Mass.), 467.....	802
Parks v. State, 20 Neb., 515.....	661
Parrat v. Neligh, 7 Neb., 459	886
Parrish v. McNeal, 36 Neb., 727.....	547
Parsons v. Russell, 11 Mich., 129.....	421
Parvin v. Wimberg, 30 N. E. Rep. (Ind.), 790.....	776
Passumpsic Bank v. Goss, 31 Vt., 315	544
Patterson v. Pittsburg & C. R. Co., 76 Pa. St., 389.....	565
Paulsen v. City of Portland, 149 U. S., 30.....	423
Paxton v. Moravek, 31 Neb., 305.....	238
Paxton v. Smith, 41 Neb., 56.....	742
Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation Canal & Land Co., 45 Neb., 884,	415, 420, 698, 701
Peak v. Ellicott, 30 Kan., 156.....	763
Pearce v. McKay, 45 Neb., 296.....	291
Pearson v. Yewdall, 95 U. S., 294.....	422
Peck v. Coalfield Coal Co., 11 Ill. App., 88.....	360
Peck v. Jenison, 58 N. W. Rep. (Mich.), 312.....	247
Pees v. Major, 1 Stra. (Eng.), 640.....	86
Peik v. Chicago & N. W. R. Co., 94 U. S., 164.....	691
Pendleton v. Trueblood, 3 Jones Law (N. Car.), 96.....	800
Pennell v. Deffell, 4 De G., M. & G. (Eng.), 372.....	761
Pentz v. Stanton, 10 Wend. (N. Y.), 271.....	260
People v. Allen, 5 Den. (N. Y.), 76.....	192
People v. Beaver, 49 Cal., 57.....	555
People v. Brinkerhoff, 63 N. Y., 259.....	86
People v. Carrique, 2 Hill (N. Y.), 93.....	529
People v. Cassiano, 30 Hun (N. Y.), 388.....	396
People v. Champion, 16 Johns. (N. Y.), 61.....	86
People v. Clarke, 62 N. W. Rep. (Mich.), 1117.....	708
People v. Common Council of City of Brooklyn, 77 N. Y., 503,	527, 535
People v. Gordon, 40 Mich., 716.....	555
People v. Gosper, 3 Neb., 310.....	268
People v. Green, 58 N. Y., 295.....	529
People v. Green, 2 Wend. (N. Y.), 274.....	93
People v. Hamilton County, 3 Neb., 244.....	736
People v. Hannon, 85 Cal., 374.....	555
People v. Head, 25 Ill., 325.....	672
People v. Hilliard, 29 Ill., 413.....	672
People v. Hurst, 41 Mich., 328.....	287
People v. Kelly, 79 Mich., 320.....	443

xlvi CASES CITED BY THE COURT.

	PAGE
People v. Kildnff, 15 Ill., 492.....	672
People v. Krummer, 4 Park Cr. Rep. (N. Y.), 217.....	656
People v. McGee, 1 Den. (N. Y.), 19.....	154
People v. McGowan, 68 N. Car., 520.....	94
People v. McKee, 68 N. Car., 429.....	94
People v. Mahauey, 13 Mich., 481.....	80
People v. Manhattan Gas Light Co., 45 Barb. (N. Y.), 136.....	201
People v. Meservey, 76 Mich., 223.....	443
People v. Nostrand, 46 N. Y., 381.....	529
People v. Pennock, 60 N. Y., 421.....	629
People v. Perkins, 85 Cal., 509.....	527
People v. Rec'amation District, 53 Cal., 348.....	423
People v. Ruyle, 91 Ill., 525.....	674
People v. Shoeb, 100 Cal., 537.....	527
People v. Taylor, 57 Cal., 620.....	527, 535
People v. Wong Ark, 30 Pac. Rep. (Cal.), 1115.....	46
People's Bank of Bellville v. Manufacturers Nat. Bank, 101 U. S., 181.....	866
Pepper v. Mayes, 81 Ky., 674.....	130
Percival v. State, 45 Neb., 741.....	151, 604
Perkins v. Butler County, 44 Neb., 110.....	315
Perry v. Scott, 109 N. Car., 374.....	797
Perry v. Sulier, 92 Mich., 72.....	128
Persinger v. Tinkle, 34 Neb., 5.....	662
Peterson v. Tufts, 31 Neb., 8.....	835
Peterson v. Ward, 23 S. W. Rep. (Tex.), 637.....	806
Phelan v. Hazard, 5 Dill. (U. S.), 45.....	359
Phelps v. Schroder, 26 O. St., 549.....	672
Phenix Ins. Co. of Brooklyn v. Rollins, 44 Neb., 745.....	783
Philadelphia Loan Co. v. Towner, 13 Conn., 248.....	583
Phillips v. Jones, 12 Neb., 213.....	821
Phœnix Ins. Co. v. Bohman, 28 Neb., 253.....	314
Pilcher v. State, 25 S. W. Rep. (Tex.), 24.....	44
Poffenbarger v. Smith, 27 Neb., 788.....	75
Pointer v. United States, 14 Sup. Ct. Rep., 410.....	640
Polin v. State, 14 Neb., 540.....	607, 609
Polk v. Covell, 43 Neb., 834.....	884, 888
Pool v. State, 23 S. W. Rep. (Tex.), 891.....	44
Porter v. Holt, 11 S. W. Rep. (Tex.), 491.....	840
Poucher v. Scott, 98 N. Y., 422.....	719
Powder River Live Stock Co. v. Lamb, 38 Neb., 339.....	221, 223
Powers v. Mitchell, 77 Me., 361.....	913
Prairie State Loan & Trust Co. v. Doig, 70 Ill., 52.....	707
Prall v. Peters, 32 Neb., 832.....	764
Preuit v. State, 5 Neb., 377.....	610

CASES CITED BY THE COURT. xlvii

	PAGE
Pullman Palace Car Co. v. Missouri P. R. Co., 115 U. S., 587,	683, 699, 701
Pyle v. Warren, 2 Neb., 241.....	742

R.

Ragoss v. Cuming County, 36 Neb., 375	35
Railroad Commission Cases, 116 U. S., 307, 331.....	691
Rakes v. People, 2 Neb., 157.....	42, 165
Randall v. Persons, 42 Neb., 607.....	899
Ratcliffe v. Bartholomew, 1 Q. B., 1892 (Eng.), 161.....	438
Rathbun v. Snow, 123 N. Y., 343.....	489, 490
Ray v. Commonwealth, 12 Bush (Ky.), 397.....	552
Raymond v. Green, 12 Neb., 215.	575, 577
Raymond v. Leavitt, 46 Mich., 447.....	586
Reagan v. Farmers Loan & Trust Co., 154 U. S., 362,	683, 691, 694, 695, 702
Redd v. Murry, 30 Pac. Rep. (Cal.), 132.....	797
Redmond v. Glover, Dud. (Ga.), 107.....	436
Reeves v. Wilcox, 35 Neb., 779.....	260
Reg. v. Nichols, 61 Eng. C. L., 246.....	154
Regents v. McConnell, 5 Neb., 423.....	377, 380
Regina v. Walker, 2 Moody & R. (Eng.), 212.....	59, 60
Reichenbach v. Washington S. L. R. Co., 38 Pac. Rep. (Wash.), 1126,	277
Reinken v. Fuehring, 130 Ind., 382.....	425
Relfe v. Rundle, 13 Otto (U. S.), 222.....	489
Renoud v. Daskam, 34 Conn., 512.....	257
Reynolds v. Dietz, 39 Neb., 180.....	260
Reynolds v. Schmidt, 20 Wis., 394.....	795
Rhode Island Hospital Trust Co. v. Keeney, 1 N. Dak., 411.....	746
Richards v. Clay County, 40 Neb., 51.....	268
* Richardson v. Campbell, 34 Neb., 181.....	870
Richardson v. Doty, 25 Neb., 420.....	329
Richardson County v. Miles, 14 Neb., 311.....	268
Rickards v. Coon, 13 Neb., 419.....	140
Riggs v. Myers, 20 Mo., 239.....	804
† Robb v. State, 35 Neb., 285.....	250, 251, 554, 556, 891
Roberts v. People, 17 Pac. Rep. (Colo.), 637.....	640
Robertson v. Johnson, 57 Tex., 62.....	799
Robinson v. Missisquoi R. Co., 59 Vt., 426.....	277
Rockland Water Co. v. Adams, 24 Atl. Rep. (Me.), 840.....	202
Rockwell v. Farmers Nat. Bank of Longmont, 36 Pac. Rep. (Colo.), 905.....	389
Rogers v. Batchelor, 12 Pet. (U. S.), 221.....	763
Roggenkamp v. Hargreaves, 39 Neb., 540.....	540, 547
Rohan v. Sawin, 5 Cush. (Mass.), 281.....	126
Roman Catholic Orphan Asylum v. Emmons, 3 Brad. (N. Y.), 144,	803

xlviil CASES CITED BY THE COURT.

	PAGE
Ross v. Langworthy, 13 Neb., 495.....	128
Ross v. Silver & Copper Island Mining Co., 26 Am. Law Reg. (Minn.), 158.....	347
Roth v. Buffalo & S. L. R. Co., 34 N. Y., 553.....	130
Roush v. State, 34 Neb., 325.....	652, 654
Ruckman v. Bryan, 3 Den. (N. Y.), 340.....	586
Rumrill v. First Nat. Bank of St. Albans, 28 Minn., 202.....	791, 795
Runge v. Brown, 23 Neb., 817.....	118
Rupert v. Penner, 35 Neb., 587.....	912
Russell v. State, 57 Ga., 420.....	397
Ryan v. State, 5 Neb., 276.....	77

S.

Sackett's Harbor Bank v. Codd, 18 N. Y., 240.....	582
Sample v. Hale, 34 Neb., 220.....	649
Sanner v. Patton, 40 N. E. Rep. (Ill.), 290.....	776
Savage v. Aiken, 21 Neb., 605.....	461, 465
Savings & Loan Society v. Thompson, 32 Cal., 347.....	438
Sawyer v. Kendall, 10 Cush. (Mass.), 241.....	805
Scanlan v. Childs, 33 Wis., 663.....	94
Schenck v. Andrews, 57 N. Y., 133.....	359
Schlencker v. State, 9 Neb., 241.....	37, 40
Schmid v. Schmid, 37 Neb., 629.....	859
Schnell v. City of Chicago, 38 Ill., 383.....	808
Schoenwald v. Rosenstein, 5 N. Y. Sup., 766.....	806
Scoville v. State Nat. Bank of Lincoln, 8 Neb., 16.....	714
Scott v. McGuire, 15 Neb., 303.....	736
Scott v. State, 48 Ala., 420.....	60
Scott v. Waldeck, 11 Neb., 525, 12 Neb., 5.....	576, 863
Scovill v. Thayer, 105 U. S., 143.....	348, 350
Sego v. Stoddard, 36 N. E. Rep. (Ind.), 204.....	776
Selser v. Brock, 3 O. St., 302.....	544
Sepp v. McCann, 50 N. W. Rep. (Minn.), 246.....	650
Seven Valleys Bank v. Smith, 43 Neb., 237.....	139, 662
Shanley v. Wells, 71 Ill., 78.....	126
Sharp v. Johnson, 44 Neb., 165.....	899
Shaw v. State, 17 Neb., 334.....	530
Shepard v. Milwaukee Gas Light Co., 6 Wis., 526.....	199, 201
Sherwin v. O'Connor, 23 Neb., 221.....	288, 290
Shippen v. Bowen, 122 U. S., 575.....	821
Shiras v. Ewing, 48 Kan., 170.....	200
Shults v. State, 37 Neb., 481.....	501, 502
Sickles v. Manhattan Gas Light Co., 64 How. Pr. (N. Y.), 33.....	202
Sidney School Furniture Co. v. School District of Warsaw Town-ship, 27 Atl. Rep. (Pa.), 856.....	248

CASES CITED BY THE COURT. xlix

	PAGE
Sieber v. Weiden, 17 Neb., 584.....	351
Sigler v. McConnell, 45 Neb., 598.....	291, 312
Simmerman v. State, 16 Neb., 615.....	126
Simon v. Durham, 10 Ore., 52.....	674
Simpson v. Gregg, 5 Neb., 237.....	853
Singer Mfg. Co. v. Belgart, 4 So. Rep. (Ala.), 400.....	176
Sioux City & P. R. Co. v. Finlayson, 16 Neb., 578...557, 564, 566, 567	
Sioux County v. Jameson, 43 Neb., 265.....	35
Skiff v. Johnson, 57 N. H., 475.....	586
Skinner v. Skinner, 38 Neb., 756.....	206
Skinner v. State, 23 Neb., 814.....	61
Slingerland v. Norton, 61 N. W. Rep. (Minn.), 322.....	729
Smails v. White, 4 Neb., 353.....	73, 79, 80
Smith v. Chicago, M. & St. P. R. Co., 53 N. W. Rep. (Ia.), 128, 55 N. W. Rep. (Ia.), 331.....	689, 690
Smith v. Crosby, 86 Tex., 15.....	797
Smith v. Henry County, 15 Ia., 385.....	199
Smith v. Hitchcock, 38 Neb., 104.....	221
Smith v. Johnson, 37 Neb., 675.....	662
Smith v. Low, 2 Ired. (N. Car.), 457.....	793
Smith v. Mason, 44 Neb., 610.....	19
Smith v. Sahler, 1 Neb., 310.....	56, 714
Smith v. Spaulding, 40 Neb., 339.....	918
Smith v. State, 21 Neb., 552.....	165
Snow v. Housatonic R. Co., 8 Allen (Mass.), 441.....	565
Snyder v. Warren, 2 Cow. (N. Y.), 518.....	436
Somes v. Skinner, 16 Mass., 360.....	821
South Stratfordsbire Tramway Co. v. Sickness & Accident As- surance Association, 1 Q. B. Div., 1891 (Eng.), 402.....	438
Sovereign v. State, 7 Neb., 409.....	79
Spencer v. Haug, 45 Minn., 231.....	440
Spencer v. Merchant, 125 U. S., 345.....	423
† Sprowl v. Lawrence, 33 Ala., 674.....	521, 523, 527
Spruill v. Davenport, 3 Jones Law (N. Car.), 42.....	791
Spurgeon v. McElwain, 6 O., 442.....	586
Stack v. Royce, 34 Neb., 833.....	788
Stackhouse v. Halsey, 3 Johns. Ch. (N. Y.), 74.....	436
Standard Distilling Co. v. Freyhan, 34 Neb., 434.....	662
Stanley v. Green, 12 Cal., 148.....	797
Stanton County v. Canfield, 10 Neb., 388.....	351
Starling v. Blair, 4 Bibb (Ky.), 288.....	798
State v. Babcock, 17 Neb., 610.....	378
State v. Bacon, 6 Neb., 286.....	101
State v. Bartley, 39 Neb., 353.....	719
State v. Bean, 16 Neb., 681.....	530
State v. Beard, 34 La. Ann., 273.....	526, 527, 529

1 CASES CITED BY THE COURT.

	PAGE
State v. Bechel, 22 Neb., 158	725, 729
State v. Berka, 20 Neb., 375.....	63, 82
State v. Bland, 97 N. Car., 438.....	239
State v. Buffalo County, 6 Neb., 454.....	35
State v. Carey, 30 Pac. Rep. (Wash.), 729.....	165
‡ State v. Carneall, 10 Ark., 156.....	523
State v. Cavers, 22 In., 343.....	674
State v. Churchill, 37 Neb., 702, 41 Neb., 41	35, 524
State v. City of Kearney, 25 Neb., 261	87
State v. City of Milwaukee, 25 Wis., 122.....	86
State v. Colvig, 15 Ore., 57	520
State v. Cooper, 53 Miss., 615.....	529
State v. County Commissioners of Lancaster County, 6 Neb., 474, 727	
State v. County Court of Texas County, 44 Mo., 230.....	537
State v. Dalton, 1 O. C. C. Rep., 161	672
State v. Denton, 22 Atl. Rep. (Md.), 305.....	192
State v. Dinsmore, 5 Neb., 145.....	674
State v. Dodge County, 8 Neb., 124.....	530
State v. Dodson, 21 Neb., 218.....	737
State v. Douglas County, 18 Neb., 506	84
State v. Duestoe, 1 Bay (S. Car.), 377.....	365
State v. Dusenberry, 20 S. W. Rep. (Mo.), 461	183
State v. Elder, 31 Neb., 169.....	672
State v. Farney, 36 Neb., 537	623
State v. First Nat. Bank of Clark, 51 N. W. Rep. (S. Dak.), 587...	666
State v. Garesche, 65 Mo., 480.....	672, 673
State v. Garrand, 5 Ore., 216	43
State v. Graham, 23 Neb., 63	854
State v. Gullette, 26 S. W. Rep. (Mo.), 354.....	656
State v. Hadley, 27 Ind., 496	520
State v. Henthorn, 46 Kan., 613.....	605
State v. Hill, 10 Neb., 58, 62, 20 Neb., 119.....	672, 674
State v. Hodges, 26 Pac. Rep. (Kan.), 676.....	640
State v. Holcomb, 46 Neb., 88.....	440
State v. Holliday, 35 Neb., 327.....	190
State v. Home Street R. Co., 43 Neb., 830.....	85
State v. Hurds, 19 Neb., 317.....	625
State v. Hyde, 22 N. E. Rep. (Ind.), 652.....	103
State v. Jaynes, 19 Neb., 161	736
State v. Johnson, 100 Ind., 489	526, 527
State v. Jones, 1 Ired. (N. Car.), 129.....	87
State v. Jones, 61 Mo., 232	60
State v. Judges, 19 Neb., 149.....	88
State v. Justices of the County Court, 41 Mo., 44	537
State v. Kavanagh, 24 Neb., 506, 510.....	672, 674
State v. Keim, 8 Neb., 63	719

CASES CITED BY THE COURT.

li

	PAGE
State v. Lancaster County, 4 Neb., 537.....	530
State v. Lancaster County, 6 Neb., 474, 17 Neb., 85.....	68, 73
State v. Langford, 45 La. Ann., 1177.....	60
State v. Lewis, 20 Nev., 333	501
State v. Liedtke, 9 Neb., 468	378
State v. McFadden, 46 Neb., 668.....	676, 736
State v. McLane, 15 Nev., 345.....	549
State v. McPeak, 31 Neb., 139.....	137
State v. Marvin, 12 Ia., 499.....	549
State v. Matheny, 7 Kan., 327.....	527, 534
State v. Matley, 17 Neb., 564.....	623, 673
State v. Moore, 36 Neb., 579.....	378
State v. Nebraska Telephone Co., 17 Neb., 126.....	195, 202, 203
State v. North Lincoln Street R. Co., 34 Neb., 634.....	331
State v. Oleson, 15 Neb., 247.....	738
State v. Page, 12 Neb., 386.....	68, 74
State v. Peacock, 15 Neb., 442.....	623, 672, 674, 736
State v. Peck, 30 La. Ann., 280	529
State v. Plambeck, 36 Neb., 401.....	737
State v. Pomeroy, 25 Kan., 349	46
State v. Porter, 7 Ind., 204	521, 525
State v. Ream, 16 Neb., 681.....	79
State v. Richards, 33 Ia., 420.....	60
State v. Ring, 29 Minn., 78.....	520
State v. Roderick, 25 Neb., 629.....	28, 31
State v. Roper, 46 Neb., 724.....	733
State v. Ruff, 4 Wash., 234; 29 Pac. Rep., 999.....	524, 525, 529, 537
State v. Russell, 34 Neb., 116.....	775
State v. Saline County, 18 Neb., 422.....	738
State v. Sbropshire, 4 Neb., 411.....	87
State v. Silver, 9 Neb., 85.....	28, 30
State v. Skirving, 19 Neb., 497.....	532
State v. Smith, 35 Neb., 13.....	94
State v. Stanley, 66 N. Car., 59.....	94
State v. Stearns, 11 Neb., 104.....	87, 623, 672, 674, 736
State v. Steers, 44 Mo., 223.....	672
State v. Stein, 35 Neb., 848.....	776
† State v. Stevenson, 18 Neb., 417.....	84
State v. Sweetland, 3 S. Dak., 503.....	151
State v. Thatch, 5 Neb., 94.....	735, 736
State v. Thayer, 31 Neb., 82.....	532, 533
State v. Thiele, 19 Neb., 220.....	13
State v. Toomer, 7 Rich. (S. Car.), 216.....	521
State v. Tucker, 54 Ala., 205.....	523, 527
State v. Van Camp, 36 Neb., 91.....	533, 737
State v. Weston, 4 Neb., 234.....	113

	PAGE
State v. Whittemore, 12 Neb., 252.....	79
State v. Wilson, 24 Neb., 139.....	736
State v. Yates, 36 Neb., 287.....	156
State Counsel v. Hickman, 57 Ala., 338.....	86
State Nat. Bank of Lincoln v. Scofield, 9 Neb., 499.....	901, 903
State Savings Bank of St. Joseph, Mo., v. Scott, 10 Neb., 83.....	918
Steele v. Spencer, 1 Pet. (U. S.), 550.....	836
Steinbridge's Appeal, 1 Penr. & W. (Pa.), 481.....	679
Stephens v. Monongahela Nat. Bank, 111 U. S., 197.....	388, 666
Steven v. Nebraska & Iowa Ins. Co., 29 Neb., 189.....	887
Stevens v. State, 19 Neb., 647.....	661
Stevenson v. Craig, 12 Neb., 464.....	918
Stewart v. State, 58 Ga., 577.....	549
Still's Estate, 15 O. St., 484.....	269
Stillwell v. Carpenter, 2 Abb. N. C. (N. Y.), 238; 62 N. Y., 639....	768
St. Louis v. State, 8 Neb., 406.....	401
St. Louis County Court v. Sparks, 10 Mo., 117.....	86
Stoker v. People, 114 Ill., 320.....	191
Stokes v. Kirkpatrick, 1 Met. (Ky.), 138.....	522
Stoner v. Millikin, 85 Ill., 218.....	544
Stratton v. Reisdorph, 35 Neb., 314.....	901, 903
Stricklett v. State, 31 Neb., 674.....	79
† Stump v. Richardson County Bank, 24 Neb., 522.....	17, 20
Sullivan Savings Institution v. Clark, 12 Neb., 578.....	855
Sutherland v. Goodnow, 108 Ill., 528.....	254
Sutton v. Mansfield, 47 Conn., 388.....	768
Sweet v. Ohio Coal Co., 47 N. W. Rep. (Wis.), 182.....	562

T.

Tacoma Hotel Co. v. Tacoma Light & Water Co., 28 Pac. Rep. (Wash.), 517.....	200
Taylor v. Coots, 32 Neb., 30.....	589
† Taylor v. State, 29 N. E. Rep. (Ind.), 415.....	370
Terry v. Beatrice Starch Co., 43 Neb., 866.....	707
Texas Express Co. v. Texas & P. R. Co., 6 Fed. Rep., 437.....	702
Thayer v. El Plomo Mining Co., 40 Ill. App., 345.....	350
Thiebaud v. First Nat. Bank of Vevay, 42 Ind., 212.....	257
Third Nat. Bank of St. Paul v. Stillwater Gas Co., 36 Minn., 75, 763	
Thomas v. City Nat. Bank of Hastings, 40 Neb., 501.....	862, 867
Thomas v. Franklin, 42 Neb., 310.....	738, 859
Thompson v. Ela, 60 N. H., 562.....	803
Thompson v. People, 4 Neb., 529.....	251
Thompson v. Riggs, 5 Wall. (U. S.), 663.....	718
Thompson v. State, 6 Neb., 102.....	251
Thurman v. State, 32 Neb., 226.....	502

CASES CITED BY THE COURT.

liii

	PAGE
Tippett v. Mize, 30 Tex., 361.....	788
Tompkins v. Batie, 11 Neb., 147.....	897, 899
Topping v. Town of St. Lawrence, 86 Wis., 526.....	8
Touzalín v. City of Omaha, 25 Neb., 817.....	73
Tower v. Fetz, 26 Neb., 710.....	329
Townsend v. Holt County, 40 Neb., 852.....	211, 217
Township of Rock Creek v. Strong, 96 U. S., 271.....	593
Tracy v. Talmage, 14 N. Y., 162.....	585
Travelers Ins. Co. v. Mosley, 8 Wall. (U. S.), 397.....	44
Trent v. Trent, 24 Mo., 307.....	791
Trumble v. Trumble, 37 Neb., 340.....	73, 74, 625
Trumble v. Williams, 18 Neb., 144.....	589
Trustees of Village of Watertown v. Cowen, 4 Paige Ch. (N. Y.), 510.....	511
Turlock Irrigation District v. Williams, 76 Cal., 360.....	417, 423
Turner v. Althaus, 6 Neb., 69.....	104
Turner v. O'Brien, 5 Neb., 542.....	128

U.

Union P. R. Co. v. Keller, 36 Neb., 189.....	752, 755
Union Stock Yards Bank v. Gillespie, 137 U. S., 411.....	763
United States v. Guiteau, 1 Mack. (D. C.), 498.....	501
United States v. Harman, 68 Fed. Rep., 472.....	442
United States v. Union P. R. Co., 148 U. S., 562.....	94
United States Express Co. v. Lucas, 36 Ind., 361.....	585

V.

Vallier v. Brakke, 64 N. W. Rep. (S. Dak.), 180, 64 N. W. Rep., 1119.....	776
Van Alen v. American Nat. Bank, 52 N. Y., 1.....	761
Van Etten v. State, 24 Neb., 734.....	286
Van Horn v. State, 46 Neb., 62.....	84, 85
Vannatta v. State Bank of Ohio, 9 O. St., 27.....	584
Verry v. McClellan, 6 Gray (Mass.), 535.....	791
Village of Cahokia v. Rautenberg, 88 Ill., 219.....	260
Village of Glencoe v. People, 78 Ill., 382.....	86
Vose v. Handy, 2 Greenl. (Me.), 322.....	803
Vought v. Foxworthy, 38 Neb., 790.....	468, 476

W.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S., 557.....	691
Wade v. Chaffee, 8 R. I., 224.....	126
Walbridge v. Day, 31 Ill., 379.....	788
Walker v. Cottrell, 6 Bax. (Tenn.), 257.....	747

	PAGE
Walrath v. State, 8 Neb., 80.....	304
Walsworth v. Johnson, 41 Cal., 61.....	331
Ward v. Clay, 23 Pac. Rep. (Cal.), 50.....	840
Ward v. Parlin, 30 Neb., 376.....	329
Ward v. Saunders, 6 Ired. (N. Car.), 382.....	797
Warren v. Raben, 33 Neb., 380.....	115
Washburn & Moen Mfg. Co. v. Scutt, 22 Fed. Rep., 710.....	331
Wasson v. Palmer, 13 Neb., 377.....	576
Watson v. Pears, 2 Campb. (Eng.), 294.....	438
Watts v. Cook, 24 Kan., 278.....	791
Watts v. Gantt, 42 Neb., 869.....	918
Wax v. State, 43 Neb., 19.....	291
Weander v. Johnson, 42 Neb., 117.....	395
Weber v. Kirkendall, 44 Neb., 766.....	853
Weed v. Edmonds, 4 Ind., 468.....	791
Weigel v. City of Hastings, 29 Neb., 379.....	73
Weldon v. State, 32 Ind., 81.....	154
Wells v. Mills, 22 Tex., 302.....	791
Wells v. Polk, 36 Tex., 121, 126.....	791, 799
Welton v. Beltezore, 17 Neb., 399.....	886
* Wescott v. Archer, 12 Neb., 345.....	740, 742, 743, 744, 746, 748
† West v. Van Pelt, 34 Neb., 63.....	221, 223
West St. Louis Savings Bank v. Parmelee, 3 Dill. (U. S.), 403; 95 U. S., 557.....	868
Western Home Ins. Co. v. Richardson, 40 Neb., 1.....	394
Wetherbee v. Baker, 35 N. J. Eq., 501.....	348, 350, 351
Wheeler v. State, 34 O. St., 394.....	500
Whitcomb v. Reed, 24 Neb., 50.....	211, 215
White v. City of Lincoln, 5 Neb., 505, 516.....	73, 75
White v. Franklin Bank, 22 Pick. (Mass.), 181.....	581
White v. Queen, 55 N. W. Rep. (Mich.), 843.....	128
White Sewing Machine Co. v. Mullins, 41 Mich., 339.....	629
Whitley v. Foy, 6 Jones Eq. (N. Car.), 34.....	763
* Whitman v. State, 42 Neb., 841.....	555, 556
Whitney v. Peay, 24 Ark., 22.....	583
Wilde v. Wilde, 37 Neb., 891.....	586
Willard v. Foster, 24 Neb., 213.....	329
Williams v. Colby, 6 N. Y. Sup., 459.....	175
Williams v. Eikenbery, 25 Neb., 721.....	228
Williams v. Evans, 87 Ala., 725.....	347
Williams v. Mutual Gas Co., 18 N. W. Rep. (Mich.), 236.....	199, 200
Williams v. School District, 21 Pick. (Mass.), 75.....	521
Williams v. State, 46 Neb., 704.....	658
Williams v. Stewart, 3 Wis., 678.....	747
Willis v. State, 43 Neb., 102.....	607, 609
Wilson v. Hastings, 66 Cal., 243.....	791

CASES CITED BY THE COURT. lv

	PAGE
Wilson v. Macklin, 7 Neb., 50.....	571
Wilson v. State, 24 Conn., 57.....	551
Wilson v. Territory, 1 Wyo., 155.....	605
Wilson's Case, 7 Q. B. (Eng.), 984.....	151
Wilt v. Cutler, 38 Mich., 189.....	803
Winkley v. Kaime, 32 N. H., 268.....	804
Witt v. Harlan, 66 Tex., 660.....	797
Wood v. City of Louisiana, 5 Dill. (U. S.), 122.....	592
Woodard v. Baird, 43 Neb., 311.....	327, 900, 902
Woods v. Monroe, 17 Mich., 238.....	795
Works v. State, 22 N. E. Rep. (Ind.), 127.....	797
Worley v. Smith, 81 N. Car., 304.....	524
Worthington v. Hylyer, 6 Mass., 196.....	806
Wren v. City of Indianapolis, 96 Ind., 206.....	86
Wurts v. Hoagland, 114 U. S., 606.....	423

Y.

Yantis v. Burdett, 3 Mo., 457	332
Yates v. McCullough Iron Co., 16 Atl. Rep. (Md.), 280.....	562
Yazoo & M. V. R. Co. v. Thomas, 132 U. S., 174.....	625
Young v. Erie Iron Co., 65 Mich., 111	359
Young v. Higgon, 6 M. & W. (Eng.), 49	438
Young v. Lane, 43 Neb., 812	861

Z.

Zink v. McManus, 49 Hun (N. Y.), 583.....	806
---	-----

TABLE OF NEBRASKA CASES OVERRULED.

- Adams v. Nebraska City Nat. Bank, 4 Neb., 370.
Musser v. King, 40 Neb., 893.
- Atchison & N. R. Co. v. Baty, 6 Neb., 37.
Graham v. Kibble, 9 Neb., 183.
- Aultman v. Obermeyer, 6 Neb., 260.
Stevens v. Carson, 30 Neb., 551.
- Banghart v. Lamb, 34 Neb., 535.
Selby v. McQuillan, 45 Neb., 512.
- Bartlett v. Bartlett, 13 Neb., 456.
Bartlett v. Bartlett, 15 Neb., 600.
- Becker v. Anderson, 11 Neb., 493.
Marsh v. Burley, 13 Neb., 264.
- Bennet v. Fooks, 1 Neb., 465.
Galway v. Malchow, 7 Neb., 285.
- Bonns v. Carter, 20 Neb., 566, 22 Neb., 517.
Jones v. Loree, 37 Neb., 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers,
44 Neb., 868.
Grand Island Banking Co. v. Costello, 45
Neb., 140.
- Bradshaw v. City of Omaha, 1 Neb., 16.
Turner v. Althaus, 6 Neb., 77.
- Bressler v. Wayne County, 25 Neb., 468.
Bressler v. Wayne County, 32 Neb., 834.
- Bryant v. Estabrook, 16 Neb., 217.
Alexander v. Thacker, 43 Neb., 497.
- Carkins v. Anderson, 21 Neb., 364.
Anderson v. Carkins, 135 U. S., 483.
Robinson v. Jones, 31 Neb., 20.
- Coy v. Jones, 30 Neb., 798.
Globe Publishing Co. v. State Bank of Ne-
braska, 41 Neb., 176.
- Crook v. Vandervoort, 13 Neb., 505.
Johnson v. Hardy, 43 Neb., 368.

Curtin v. Atkinson, 29 Neb., 612.
Curtin v. Atkinson, 36 Neb., 110.
Dawson v. Merrille, 2 Neb., 119.
Simmons v. Yurann, 11 Neb., 516.
Carkins v. Anderson, 21 Neb., 368.
Edgington v. Cook, 32 Neb., 551.
Graff v. Ackerman, 38 Neb., 720.
Filley v. Duncan, 1 Neb., 135.
Colt v. Du Bois, 7 Neb., 396.
Gee Wo v. State, 36 Neb., 241.
O'Connor v. State, 46 Neb., 158.
Geisler v. Brown, 6 Neb., 254.
World Publishing Co. v. Mullen, 43 Neb., 128.
Godman v. Converse, 38 Neb., 657.
Godman v. Converse, 43 Neb., 464.
Hagenbuck v. Reed, 3 Neb., 17.
Graff v. Ackerman, 38 Neb., 724.
Hallenbeck v. Hahn, 2 Neb., 377.
Johnson v. Hahn, 4 Neb., 139.
Handy v. Brong, 4 Neb., 66.
Buckmaster v. McElroy, 20 Neb., 564.
Henry v. Vliet, 33 Neb., 130.
Henry v. Vliet, 36 Neb., 138.
Hollenbeck v. Tarkington, 14 Neb., 430.
Sharp v. Brown, 34 Neb., 406.
Holmes v. Andrews, 16 Neb., 296.
Alexander v. Thacker, 43 Neb., 497.
Horn v. Miller, 20 Neb., 98.
Bickel v. Dutcher, 35 Neb., 761.
Continental Building & Loan Association v. Mills, 44 Neb., 142.
Howell v. Roberts, 29 Neb., 483.
Globe Publishing Co. v. State Bank of Nebraska, 41 Neb., 176.
Hurley v. Estes, 6 Neb., 391.
Hale v. Christy, 8 Neb., 264.
Kittle v. De Lamater, 3 Neb., 325.
Smith v. Columbus State Bank, 9 Neb., 31.
Kyger v. Ryley, 2 Neb., 26.
Hale v. Christy, 8 Neb., 264.
La Flume v. Jones, 5 Neb., 256.
Burkett v. Clark, 46 Neb., 498.

TABLE OF CASES OVERRULED.

lix

- Landauer v. Mack, 39 Neb., 8.
Landauer v. Mack, 43 Neb., 430.
- Lipscomb v. Lyon, 19 Neb., 511.
Stevens v. Carson, 30 Neb., 551.
- McClure v. Warner, 16 Neb., 447.
Alexander v. Thacker, 43 Neb., 497.
- McCord v. Weil, 29 Neb., 682.
McCord v. Weil, 33 Neb., 869.
- McDonald v. Bowman, 35 Neb., 93.
McDonald v. Bowman, 40 Neb., 269.
- Manly v. Downing, 15 Neb., 637.
Green v. Sanford, 34 Neb., 363.
- Morrissey v. Schindler, 18 Neb., 672.
Herron v. Cole, 25 Neb., 692.
Hanna v. Emerson, 45 Neb., 709.
- Nickolls v. Barnes, 32 Neb., 195.
Nickolls v. Barnes, 39 Neb., 103.
- Osborne v. Canfield, 33 Neb., 330.
Moline v. Curtis, 38 Neb., 534.
- Otoe County v. Brown, 16 Neb., 394.
Alexander v. Thacker, 43 Neb., 497.
- Peckinbaugh v. Quillin, 12 Neb., 586.
Burnham v. Doolittle, 14 Neb., 216.
- Peters v. Dunnells, 5 Neb., 460.
Hale v. Christy, 8 Neb., 264.
- Phenix Ins. Co. v. Swantkowski, 31 Neb., 245.
Sharp v. Brown, 34 Neb., 406.
- Phillips v. Bishop, 31 Neb., 853.
Phillips v. Bishop, 35 Neb., 487.
- Pickens v. Plattsmouth Investment Co., 31 Neb., 585.
Pickens v. Plattsmouth Investment Co., 37 Neb., 272.
- Republican V. R. Co. v. Boyse, 14 Neb., 130.
Donovan v. Sherwin, 16 Neb., 130.
- Rice v. Gibbs, 33 Neb., 460.
Rice v. Gibbs, 40 Neb., 265.
- Richardson v. Campbell, 34 Neb., 181.
Havemeyer v. Paul, 45 Neb., 374.
Omaha Loan & Trust Co. v. Hanson, 46 Neb., 870.
- Rittenhouse v. Bigelow, 38 Neb., 543.
Rittenhouse v. Bigelow, 38 Neb., 547.

- Sandwich Mfg. Co. v. Feary, 34 Neb., 411.
Sandwich Mfg. Co. v. Feary, 40 Neb., 226.
Schoenheit v. Nelson, 16 Neb., 235.
Alexander v. Thacker, 43 Neb., 497.
Shawang v. Love, 15 Neb., 142.
Hurlburt v. Palmer, 39 Neb., 159.
Shellenberger v. Ransom, 31 Neb., 61.
Shellenberger v. Ransom, 41 Neb., 632.
Smith v. Boyer, 29 Neb., 76.
Smith v. Boyer, 35 Neb., 46.
Stanwood v. City of Omaha, 38 Neb., 552.
Stanwood v. City of Omaha, 42 Neb., 304.
State v. Krumpus, 13 Neb., 321.
Mann v. Welton, 21 Neb., 541.
Hamilton v. Fleming, 26 Neb., 240.
State v. Wilson, 31 Neb., 464.
State v. Priebe, 16 Neb., 131.
Arnold v. State, 38 Neb., 752.
State v. Sanford, 12 Neb., 425.
Mann v. Welton, 21 Neb., 541.
Hamilton v. Fleming, 26 Neb., 240.
State v. Wilson, 31 Neb., 464.
State v. Sioux City & P. R. Co., 7 Neb., 357.
Foree v. Stubbs, 41 Neb., 271.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Neb., 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Neb., 29.
St. Joseph & D. R. Co. v. Baldwin, 7 Neb., 247.
St. Joseph & D. R. Co. v. Baldwin, 103 U. S., 426.
Strader v. White, 2 Neb., 348.
Waggoner v. First Nat. Bank of Creighton, 43 Neb., 85.
Svanson v. City of Omaha, 38 Neb., 550.
Svanson v. City of Omaha, 42 Neb., 303.
Thomas v. Edgerton, 36 Neb., 254.
Thomas v. Edgerton, 40 Neb., 26.
Walker v. Morse, 33 Neb., 650.
Moline v. Curtis, 38 Neb., 528.
Wescott v. Archer, 12 Neb., 345.
Grebe v. Jones, 15 Neb., 317.
Darnell v. Mack, 46 Neb., 740.

TABLE OF CASES OVERRULED.

lxi

White v. State, 28 Neb., 341.

Coffield v. State, 44 Neb., 418.

Whitman v. State, 42 Neb., 841.

Metz v. State, 46 Neb., 556.

Wilson v. Macklin, 7 Neb., 50.

Muller v. Plue, 45 Neb., 702.

Woodruff v. White, 25 Neb., 745.

Stevens v. Carson, 30 Neb., 551.

Woods v. Shields, 1 Neb., 454.

Kyger v. Ryley, 2 Neb., 27.

STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

STATE.

SESSION LAWS.

	1869.	PAGE
P. 172. Act founding University of Nebraska.....		376
	1870.	
P. 13. Act making state treasurer custodian of the University endowment fund.....		376
P. 31, sec. 32. Warden of penitentiary.....		612
	1875.	
P. 38. Confirmation of judicial sales.....		901, 906
P. 150, sec. 2. Election by legislature of trustees for institution for the blind.....		88, 90, 91, 95, 101, 112
P. 150, sec. 4. Powers of trustees of institution for the blind...		100
P. 151, sec. 10. Board of trustees for institution for the blind...		90, 96
P. 154. Government of the State University.....		376, 378
	1877.	
P. 51, sec. 1. Compensation of county clerks.....		30
P. 71. Township organization.....		68
P. 136, sec. 5. Right to construct street railways; elections.....		728
P. 188. Board of public lands and buildings.....		101, 612, 614, 621
P. 189, sec. 1. Officers of board of public lands and buildings...		622
P. 190, secs. 3, 4. Powers of board of public lands and buildings,		622
P. 194, sec. 17. Authority to lease convict labor.....		613, 623
P. 199. Act to regulate purchase of supplies for state institutions,		613, 614
P. 215. Fees of sheriffs and county judges.....		295
	1879.	
P. 90, sec. 39. Jurisdiction of district judges at chambers,		901, 905, 906
P. 353. Act concerning counties and county officers.....		68, 74
	1881.	
P. 102, ch. 13, sec. 23. Act concerning official bonds and oaths...		90
P. 226, ch. 46. Jurisdiction of district judges at chambers...		901, 906

	1883.	PAGE
P. 202, ch. 36. Township organization.....		68
	1885.	
P. 253, ch. 51. Fees of county officers		296
	1887.	
P. 463, ch. 44. Fees of county officers		296
P. 565, ch. 64, sec. 1. Bond of abstractor.....		765, 766, 769
P. 587, ch. 72. County bridges.....		211, 215, 216
	1891.	
P. 245, ch. 24, sec. 13. Official ballots		774
P. 251, ch. 24, sec. 20. Manner of marking ballots		772, 774
P. 260, ch. 24. Marking official ballots		775
P. 262, ch. 26. Fees of county clerks; fee book.....		409
P. 280, ch. 35. Act creating state board of health.....		157
P. 282, ch. 35, sec. 7. Physicians and surgeons; qualifications,		161, 163
P. 283, ch. 35, secs. 9, 10. License to practice medicine.....		162
sec. 11. Physicians and surgeons; license to prac-		
tice		157, 158, 162-164
P. 285, ch. 35, sec. 16. Penalty for practicing medicine without		
a license		162
sec. 17. Definition of "practicing medicine"....		158, 164
P. 334, ch. 46. School district ownership of text-books....		858, 859, 861
P. 347, ch. 50. Act to provide for depositing state and county		
funds in banks		76, 633, 642
	1893.	
P. 142, ch. 11. Railroad companies; transfer switch law,		
683, 687, 688, 695, 697, 698, 703		
P. 164, ch. 24. Maximum rate law		696
P. 385, ch. 44. Penalty for murder		25, 27, 427, 434, 435
	1895.	
P. 131, ch. 28. Township organization.....		63, 67, 69, 85
P. 149, ch. 28, sec. 65. Duties of county supervisors.....		70
P. 234, ch. 65. Uniform system of vouchers.....		373, 374, 378
P. 235, ch. 65, sec. 2. Claims against the state.....		374
sec. 3. Forms of claims against the state.....		375
P. 237, ch. 66, sec. 5. Authority to lease convict labor, and act to		
annul Mosher contract.....		613, 624, 625
P. 269, ch. 70. District irrigation law.....		411
P. 302, ch. 70, sec. 59. Formation of irrigation districts; issuance		
of bonds.....		414

GENERAL STATUTES.

	1873.	
P. 1031, ch. 76. Penitentiary; duties of warden.....		613, 621
P. 1036, ch. 76, sec. 15. Officers of penitentiary.....		626

TABLE OF STATUTES.

lxv

PAGE

P. 1038, ch. 76, sec. 31. Penitentiary; duties of warden.....	621, 626
sec. 32. Transactions with warden of peniten- tiary.....	621

COMPILED STATUTES.

1-87.

Ch. 28, sec. 13a. Fees of county clerks; fee books.....	409
Ch. 78, sec. 83. Contracts for building bridges and repairing roads.....	211, 216, 217, 219
sec. 84. Bids for bridge contracts.....	216

1895.

Ch. 6, sec. 9. Notice of meeting to choose assignee.....	599
sec. 16. Voluntary assignments; time to file claims.....	599
sec. 44. Voluntary assignments; wages of clerks and serv- ants.....	436
Ch. 7, secs. 20, 21. County attorneys and deputies.....	631, 637
Ch. 8, secs. 22, 23. Insolvent banks; penalty for receiving de- posits.....	716, 717
Ch. 9, sec. 37. Duty of auditor in registering bonds.....	592
Ch. 10, sec. 5. Time for filing official bonds.....	517
secs. 7, 15, 17. Office and officers; official bonds; ap- proval.....	514, 517
Ch. 14, art. 1, sec. 89. Contracts with cities of the second class and villages.....	218
Ch. 16, sec. 113. Railroad crossings.....	687
Ch. 17, art. 3, sec. 1. Relocation of county seat	724, 726
Ch. 18, art. 1, secs. 20, 21. Counties; corporate names; powers of county boards	34
sec. 22, sub. 3. Contracts with counties.....	34
sec. 23, sub. 5. Allowance of claims against counties	34
secs. 37, 38. Verification; filing and allowance of claims against counties; appeals	34
sec. 43. Settlement of accounts of county board, 31, 33	
secs. 44, 45. Actions to recover accounts due county, 33	
sec. 133. Form of municipal bonds.....	591
art. 4, sec. 4. Supervisors' districts	76, 77, 79
sec. 5. Numbering supervisors' districts	78
sec. 7. Appointment of supervisors.....	78
sec. 8. Organization of board of supervisors.....	78
Ch. 19, sec. 42. Terms of district court	290
sec. 53. Modification of instructions.....	362, 370
Ch. 20, sec. 42. Appeal from order of probate court	267, 268
Ch. 21, secs. 1, 2. Death by wrongful act	4, 7
Ch. 23, secs. 42, 43, 47, 48, 53. Purposes for sale of ward's real estate; procedure	768, 789

	PAGE
Ch. 23, sec. 64. Guardian's sale	784, 792-794
sec. 304. County court; settlement of estate; appeal from order of distribution	264, 267, 268
secs. 313, 314. Suit on bond of administrator or executor, 269	
Ch. 26, sec. 64. Right to contest elections	738
sec. 101. Vacancies in office	514, 518, 519
sec. 103. Elections; filling vacancies.....	531
sec. 104. Hold-over officers.....	539
sec. 105. Appointment of officers.....	531
sec. 107. Vacancies in office.....	531
sec. 138. Official ballots	774
sec. 145. Manner of marking ballots.....	775
Ch. 28, sec. 26. Costs of attachment.....	722
sec. 42. Compensation of county officers.....	292, 293
Ch. 32, sec. 14. Mortgages	836
sec. 15. Manner of satisfying chattel mortgages; penalty for failure to discharge liens.....	303, 309, 311, 312
sec. 26. Sales; written contracts.....	830, 833, 835
Ch. 40, sec. 54. Definition of "insane".....	499
Ch. 44, sec. 5. Usury.....	384, 664
Ch. 50. Intoxicating liquors.....	451
sec. 20. Penalty for unlawful sale of liquors.....	659
sec. 25. License to sell intoxicating liquors.....	579
Ch. 54, art. 1, sec. 2. Mechanics' liens.	207, 210
sec. 3. Procedure to obtain mechanics' liens.....	874, 875
Ch. 55, art. 1, secs. 1-19. Act creating state board of health....	158
Ch. 72, art. 7, secs. 4, 5. Right to construct street railways; elections	727
Ch. 73, sec. 65. Bond of abstractor.....	765, 766
Ch. 77, secs. 80, 81, 82. Tax lists.....	409
sec. 127. Form of tax deeds.....	426
Ch. 79, sub. 5, sec. 8. School funds.....	860
Ch. 83, art. 4, sec. 2. Duties of state treasurer.....	628
art. 12, sec. 2. Board of purchase and supplies.....	616
Ch. 91, sec. 5. Weights and measures.....	232

CODE OF CIVIL PROCEDURE.

Art. 4. Referees.....	853
Art. 6. New trial.....	853
Sec. 77. Service by publication.....	749
Sec. 99. Pleading; answer.....	602, 764
Sec. 104. Set-off.....	577
Sec. 144. Amendment of pleadings.....	570
Sec. 145. Pleading; immaterial errors.....	847
Secs. 181, 182. Replevin; delivery of property; affidavit.....	573
Sec. 198. Grounds of attachment.....	749

TABLE OF STATUTES.

lxvii

	PAGE
Sec. 260. Contempt for disobedience of injunction.....	14, 16
Sec. 282. Jury.....	498
Secs. 298, 299. Reference.....	854
Sec. 311. Bill of exceptions.....	288, 289
Sec. 328. Competency of witnesses.....	152, 153
Sec. 331. Husband and wife as witnesses.....	206
Sec. 360. Attachment for witnesses.....	406
Sec. 365. Oath of witnesses.....	405
Sec. 383. Depositions.....	843
Sec. 430. Dismissal of actions.....	846
Sec. 477. Lien of judgments.....	681
Sec. 490. Sale under execution.....	468, 477
Secs. 491a-491d. Executions; judicial sales; duties of officers,	466, 470
Sec. 495. Appraisement under execution.....	468, 477, 478
Sec. 498. Confirmation of judicial sales.....	901, 905-907
Sec. 504. Executions.....	468, 477, 478
Sec. 510. Time for sheriff to return execution.....	468, 477
Sec. 513. Sheriffs; penalty for neglect of duty.....	479
Sec. 532. Proceedings in aid of execution.....	403
Sec. 581. Final order.....	52, 55, 56, 140
Sec. 582. Final orders; review by supreme court.....	54, 56
Sec. 594. Supreme court; judgment of reversal.....	55, 56
Sec. 664. Additional jurors.....	498
Sec. 669. Power of court to punish for contempt.....	150, 405
Sec. 675. Transcripts for appeal.....	407
Sec. 677. Order dissolving injunction; appeal bond.....	12
Secs. 679-681. Injunction; supersedeas.....	714
Sec. 852. Judicial sale of mortgaged premises.....	189
Sec. 854. Distribution of proceeds of mortgage foreclosure.....	190
Sec. 894. Oaths and affirmations.....	405
Sec. 895. Method of computing time.....	427, 440
Secs. 1033, 1034. Replevin; jurisdiction; affidavit.....	573
Sec. 1039. Transferring cases to court of competent jurisdiction,	569

CRIMINAL CODE.

Secs. 1, 2. Accessories.....	299, 304
Sec. 3. Murder.....	427, 435
Sec. 6. Abortion.....	300
Sec. 12. Rape.....	447, 448
Sec. 17. Assault and battery.....	155-157
Sec. 30. Resisting and abusing officers.....	156
Sec. 48. Burglary.....	547, 550
Sec. 54. Arson.....	823, 825, 827
Sec. 121. Embezzlement.....	116-118, 187, 191, 193, 284, 287
Sec. 121b. Larceny; conversion by bailee.....	398

lxviii TABLE OF STATUTES.

	PAGE
Sec. 124. Embezzlement of public money.....	633, 642
Sec. 145. Forgery	652, 655
Secs. 389, 390. Discharge of prisoner not indicted.....	146
Sec. 391. Discharge of prisoner not brought to trial,	
	144, 146, 147, 631, 636
Sec. 417. Allegations in indictments for fraud	654
Sec. 420. Indictments; description of money.....	362, 369
Sec. 444. Waiver of defects by demurring to indictment.....	632, 639
Sec. 454. Trial of person who becomes insane after committing a crime.....	26
Sec. 465. Criminal law; separate trials	548
Sec. 465a. Special venire	498
Sec. 473. Defendant in a criminal case as witness.....	552
Sec. 495. Procedure in sentencing convicts	366
Sec. 503. Sentence in capital cases.....	443
Sec. 518. Sentence of convicts	443
Sec. 547. Execution of death sentence.....	443
Sec. 553. Insanity of persons under sentence of death.....	26
Sec. 579. Informations.....	631, 637, 660
Sec. 585. Preliminary examinations.....	632

CONSTITUTION.

	1866.
Art. 7, secs. 1, 2. School lands and funds.....	375
	1875.
Art. 1, sec. 3. Due process of law.....	411, 414
sec. 10. Indictments and informations.....	631, 636
sec. 11. Right of accused to a speedy trial.....	636
sec. 21. Taking private property.....	414
Art. 2, sec. 1. Distribution of powers of state government.....	99, 102
Art. 3, sec. 1. Legislative authority.....	414, 424
sec. 11. Title of bills.....	62, 63, 63, 79, 624
sec. 20. Vacancies in office	515, 530
sec. 24. Time laws go into effect.....	427, 435
Art. 5, sec. 1. Officers of executive department of the state gov- ernment	113
sec. 10. Appointment of officers by governor,	
	88, 91, 98, 105, 106, 108
sec. 19. Board of public lands and buildings,	
	100, 101, 612, 614, 621, 625
sec. 21. Accounts of public officers.....	113
sec. 22. Reports to governor.....	113
sec. 26. State officers.....	112, 113
Art. 6, sec. 2. Jurisdiction of supreme court.....	54
sec. 18. Jurisdiction of justices of the peace.....	155, 157
sec. 19. Uniform operation of laws.....	82

TABLE OF STATUTES.

lxix

	PAGE
Art. 6, sec. 21. Vacancies in judicial departments.....	531
Art. 8, sec. 10. Government of the University of Nebraska.....	376
Art. 9, sec. 1. Uniform taxation.....	412, 414, 425
Art. 10, sec. 4. Election of township and county officers.....	63, 81
sec. 5. Township organization.....	63, 67, 80, 726
Art. 11, sec. 2. Street railways.....	727
sec. 4. Corporations; liability of subscribers for stock,	333, 342

FEDERAL.

STATUTES AT LARGE.

Vol. 12, p. 503, ch. 130. Federal grant of land for colleges in the states and territories.....	375
Vol. 13, p. 47, ch. 59, sec. 10. Federal grant of land for state university.....	375
Vol. 22, p. 163, ch. 290, sec. 4. National banks; jurisdiction...	665, 666
Vol. 25, p. 436, ch. 866. Forum of jurisdiction relating to national banks.....	389

REVISED STATUTES.

Sec. 5198. Usury.....	381, 382, 385, 386, 387, 666, 667
-----------------------	-----------------------------------

CONSTITUTION.

14th amendment, sec. 1. Citizenship; due process of law.....	414, 691
--	----------

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

MICHAEL D. MURPHY V. WILLIAM D. ERNST.

FILED OCTOBER 1, 1895. No. 6420.

Malicious Prosecution: TIME ACTION ACCRUES. As a general rule, an action for malicious prosecution will not lie until the proceeding complained of has been legally terminated in favor of the defendant therein.

ERROR from the district court of Johnson county. Tried below before BABCOCK, J.

Francis Martin and *J. Hall Hitchcock*, for plaintiff in error, cited: *Welch v. Boston & P. R. Corp.*, 14 R. I., 609;

 Murphy v. Ernst.

Phillips v. Village of Kalamazoo, 53 Mich., 33; *Labar v. Crane*, 49 Mich., 561; *Olson v. Neal*, 63 Ia., 214; *Johnstone v. Sutton*, 1 T. R. [Eng.], 544; *Ash v. Marlow*, 20 O., 119.

S. P. Davidson, *contra*, cited: *Cooley*, Torts [2d ed.], 214; *Griffis v. Sellars*, 31 Am. Dec. [N. Car.], 422; *Womack v. Circle*, 32 Gratt. [Va.], 324; *Payson v. Caswell*, 22 Me., 212; *Severance v. Judkins*, 73 Me., 376; *Turner v. O'Brien*, 5 Neb., 543; *Wertheim v. Altschuler*, 12 Neb., 594; *Palmer v. Keith*, 16 Neb., 93; *Painter v. Ives*, 4 Neb., 126; *Bodwell v. Osgood*, 3 Pick. [Mass.], 379; *Marshall v. Betner*, 17 Ala., 832; *Sweet v. Negus*, 30 Mich., 406.

POST, J.

This was an action for malicious prosecution in the district court for Johnson county. For his cause of action therein the plaintiff below, who is also plaintiff in error, alleged that the defendant, maliciously and without probable cause, made a complaint before one Fugate, a justice of the peace for Nemaha county, charging him, plaintiff, with trespassing upon the land of the said complainant and cutting and removing grass growing thereon. The proceedings before the justice of the peace are shown by the following record introduced in evidence by the plaintiff:

"STATE OF NEBRASKA	} ss.	September 7, 1891.
v.		
MIKE MURPHY.		

"In Justice Court, before R. M. Fugate, Justice of the Peace.

"Now comes William Ernst, through his agent, G. L. Ernst, and makes oath and says that one Mike Murphy did, on the 6th and 7th days of September, 1891, trespass on land known as the Sears land, now in the possession of said plaintiff, after being duly warned off the premises, feloniously cut and take away hay. Plaintiff asks for war-

rant. I therefore issue warrant for the arrest of said defendant and place same in the hands of J. M. Stone, constable, returnable on the 7th day of September, 1891, at 1 o'clock P. M.

"September 7, 1891, — o'clock, court called prisoner in court, who pleaded not guilty and introduced letters pertaining to contract for the possession of the land now in controversy. Plaintiff also introduced letters pertaining to contract with B. Sears.

"Return of warrant September 7, 1891. I took the body of Mike Murphy, within named and have him before the within named justice of the peace. J. M. Stone, Constable.

"Plaintiff's witnesses, G. L. Ernst, George Errick, Sr.

"The court, by consent of the prisoner, continued the case until September 8, 1891, in the afternoon, at 7 o'clock P. M.

"September 8, 1891, at 7 o'clock P. M., court called, parties all present. Examination of witnesses for plaintiff. William Ernst first. The court, after hearing all the testimony and deliberations, finds the defendant guilty as charged. It is the judgment of this court that the defendant pay a fine of \$25 and costs of suit, which was paid by defendant, costs taxed at \$6.75."

Upon the conclusion of the plaintiff's case the defendant requested the court to direct a verdict in his favor, whereupon leave was given to amend the petition by the addition of an allegation charging that the judgment of conviction shown by the foregoing record was unwarranted by the evidence and procured by fraud and in pursuance of a conspiracy between the defendant and the said justice. The motion for a peremptory instruction was thereupon renewed and sustained, which is the error assigned as the basis of this proceeding.

An action for malicious prosecution cannot as a rule be successfully maintained until the proceeding complained of

Orgall v. Chicago, B. & Q. R. Co.

has been legally terminated in favor of the defendant therein. (*Casebeer v. Drahoble*, 13 Neb., 465; Addison, Torts, 874.) True, an exception to that rule is recognized in cases where a conviction is procured by means of the fraud or perjury of the complainant (*Olson v. Neal*, 63 Ia., 214; 14 Am. & Eng. Ency. of Law, 290), but a careful examination of the record fails to disclose any foundation in the evidence for the application of the exception above noted. In the absence of proof tending to impeach the good faith of the justice of the peace or the complainant, the direction complained of was proper and the judgment must accordingly be

AFFIRMED.

JOSEPH ORGALL, ADMINISTRATOR, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED OCTOBER 1, 1895. No. 6322.

1. Death by Wrongful Act: PECUNIARY INJURY: PLEADING.

A petition under chapter 21, Compiled Statutes, for the death of the plaintiff's intestate by the wrongful act of the defendant is fatally defective, which fails to show that the person or persons for whose benefit the action is brought have sustained pecuniary injury by the death of the deceased.

2. ——— : ——— : ———. Nor will the petition in the absence of such allegation support a judgment for nominal damages. (*Hurst v. Detroit City R. Co.*, 84 Mich., 539.)

3. ——— : ——— : ———. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, distinguished.

4. **Review.** The court will not review a judgment of the district court upon allegations of error where the successful party is clearly entitled to judgment on the pleadings.

ERROR from the district court of Fillmore county.
Tried below before HASTINGS, J.

Webster, Rose & Fisher and *E. W. Metcalf*, for plaintiff in error.

T. M. Marquett, J. A. Kilroy, and J. W. Deweese, contra.

POST, J.

This is a petition in error and presents for review a judgment of the district court for Fillmore county. The action below was to recover damages on account of the killing of the plaintiff's intestate, Maria Tatro, by an engine operated by the defendant company on the 26th day of June, 1891. At the trial below, before Hastings, J., and a jury, there was a verdict for the defendant at the conclusion of the plaintiff's evidence by direction of the court, and which ruling is the basis of this proceeding.

The facts which the plaintiff's evidence tends to establish are as follows: On the day of the accident the deceased purchased a ticket from the defendant's station agent at Grafton, good to Denver, Colorado, intending to take passage on the regular west-bound passenger train. On being advised by the agent that the train was two hours and twenty minutes late she decided not to wait at the station, and accordingly returned to the village south of the railroad track, going to the house of a friend, Mrs. Haney, and from thence to the store kept by a Mr. Haney. About an hour and a half or an hour and three quarters after the deceased had returned to the village, an extra or wild train approached the station running at a high rate of speed, estimated by some witnesses at thirty-five miles per hour. Regular warning was given of the wild train, and the witnesses agree that the engine whistle was sounded continuously from the time the train reached the first cross street of the village until it had passed the station, and also that the bell was ringing. At the first sound of the whistle the deceased and Mrs. Haney ran hurriedly toward the station, nearly a quarter of a mile distant. As they ap-

Orgall v. Chicago, B. & Q. R. Co.

proached the side track, which is forty-five feet south of the main track, the deceased, who was in advance of Mrs. Haney, took the latter by the hand as if to assist her forward. At that point a Mr. Warren stepped in front of the women and raised his hands as if warning them to stop, although no witness was near enough to hear what, if anything, was said by him. They apparently took no notice of the warnings thus given, but ran toward the station platform on the north side of and adjoining the main track. As they approached the main track Mrs. Haney passed the deceased, and when in the act of crossing the track fell and was struck and killed by the engine. The deceased, who had in the meantime stepped from the sidewalk to the west or left-hand side, stooped forward as if attempting to rescue her companion, when she was struck on the head by the steam chest of the engine and also instantly killed. In addition to the rate of speed of the train in question it is alleged and proved that an elevator situated on the east and opposite side of the street from the sidewalk leading to the station partially obstructed the view from the street of trains approaching from the east, and that the view of the track was on that occasion further obstructed by a freight car by the defendant negligently permitted to stand on said track just west of the elevator above mentioned and partly in the street; also, that the sidewalk across the defendant's right of way, and adjacent to the main track, was so negligently constructed as to leave dangerous holes and spaces therein which were liable to cause passers-by to stumble and fall. It is further charged that the deceased's companion, Mrs. Haney, "was entangled by said dangerous sidewalk and thrown in front of the approaching train, and the deceased, in stooping to assist the former in her emergency, was struck," etc. The answer admits the killing of the deceased at the time alleged, but is in effect a denial of all of the other allegations of the petition.

It is strenuously insisted that there was sufficient evidence for the submission of the cause to the jury, and that the court accordingly erred in directing a verdict for the defendant. We are, however, unable to disturb the judgment of the district court, for the reason that, in our opinion, the petition fails to state a cause of action, and the ruling complained of is at most error without prejudice, since a second trial would necessarily result in a judgment adverse to the plaintiff.

The only allegation of the petition as to the next of kin of the deceased is the following: "The plaintiff is the father and next of kin of Maria Tatro, a single woman, who died without issue at the county of Fillmore, Nebraska, on the 26th day of June, 1891, intestate, and on the 29th day of September, 1892, letters of administration were duly issued to the plaintiff by the county court of Fillmore county, and plaintiff has duly qualified as such administrator and entered upon the duties of his office, and as such administrator brings this suit." It is by chapter 21, Compiled Statutes, provided:

"Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distrib-

Orgall v. Chicago, B. & Q. R. Co.

uted to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries, resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; *Provided*, That every such action shall be commenced within two years after the death of such person."

It has been frequently held that a petition which does not disclose the existence of some person who has suffered pecuniary injury by the death of the deceased or to whom he would have contributed in a pecuniary way, fails to state a cause of action under the foregoing provisions. (*Topping v. Town of St. Lawrence*, 86 Wis., 526; *Coops v. Lake S. & M. S. R. Co.*, 66 Mich., 448; *Hurst v. Detroit City R. Co.*, 84 Mich., 539; *Charlebois v. Gogebic & M. R. Co.*, 91 Mich., 59; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, and cases cited.) We have not overlooked the following expression of the present chief justice in the last mentioned case: "Under the proof they [the jury] were warranted in inferring that the next of kin were not pecuniarily injured by the death of the intestate, hence the plaintiff was only entitled to recover nominal damages." But that language was used with reference to the case then before the court, by which it was sought by the plaintiff below to reverse a judgment for nominal damages, and in nowise conflicts with the rule here approved, while in *Hurst v. Detroit City R. Co.*, *supra*, it is expressly decided, on the authority of *Franklin v. South E. R. Co.*, 3 Hurl. & N. [Eng.], 213, and *Duckworth v. Johnson*, 4 Hurl. & N. [Eng.], 653, that nominal damages are not recoverable in like cases in the absence of an allegation and proof of pecuniary injury to the next of kin or others beneficially interested in the life of the deceased. Nor was the plaintiff more fortunate

in his proof, from which it appears that the deceased, who was at the time of her death forty-three years of age, had resided in this state and Kansas for twenty years or more, during all of which period the plaintiff was a resident of the state of Wisconsin, and there is in the record nothing to indicate that she had ever contributed to his support, or that he was in any manner dependent upon her. True, the plaintiff was permitted, over the defendant's objection, to prove that the deceased was capable of earning from \$3 to \$5 per week as a nurse, but that fact alone will not, as we have seen, satisfy the requirements of the statute. Our only embarrassment in thus disposing of the cause is the fact that the arguments of counsel are devoted to the question of negligence alone, from which it may be inferred either that the sufficiency of the petition was not challenged in the district court, or that the question of pleading has been waived by the defendant in order to insure a determination of the cause on its merits in this court; but whatever motives may have led counsel to ignore that question, it cannot be overlooked by us, since it would be an idle and profitless proceeding to remand a cause for trial *de novo* which must inevitably result in a judgment adverse to the plaintiff in error. An actionable wrong is essential to every valid judgment, for, as has been said, "An unsupported judgment is as a foundationless structure." (Elliott, Appellate Procedure, sec. 471.) The direction complained of was right, and the judgment of the district court must be

AFFIRMED.

FRED O'CHANDER V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7469.

1. **Contempt: NATURE OF PROCEEDINGS.** Proceedings in contempt are criminal in their nature, and the rules of strict construction applicable to criminal proceedings are to govern therein.
2. ———: **APPEAL BOND: INJUNCTION.** An appeal bond in an action for injunction which omits a material condition prescribed by law is insufficient and will not operate to supersede a decree of the district court dissolving an order of injunction and continue the order in force during the pendency of the appeal to this court.
3. ———: **SUFFICIENCY OF COMPLAINT.** The complaint or information in this case examined, and held insufficient to sustain the conviction and sentence of plaintiff in error.

ERROR to the district court for Dakota county. Tried below before NORRIS, J.

Barnes & Tyler and Taylor, Shüll & Farnsworth, for plaintiff in error, cited: *Smith v. Sahler*, 1 Neb., 310; *Scofield v. State National Bank of Lincoln*, 8 Neb., 16; *School District v. Brown*, 10 Neb., 440; *Steele v. Haynes*, 20 Neb., 319; *Troupe v. Eade*, 42 Ia., 552; *Brevoort v. City of Detroit*, 24 Mich., 322; *Hovey v. McDonald*, 109 U. S., 161; *Slaughter House Cases*, 10 Wall. [U. S.], 273; *Knox County v. Harshman*, 132 U. S., 14; *Hart v. Mayor of Albany*, 3 Paige Ch. [N. Y.], 380; *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 5 Sawyer [U. S.], 121.

A. S. Churchill, Attorney General, *John T. Spencer*, and *R. E. Evans*, for the state.

HARRISON, J.

It appears from the record in this case that an action of injunction was commenced against the plaintiff in error in

the district court of Dakota county, and the district judge being absent from the county, the county judge issued a temporary order. That due service of this and a summons in the action was had upon plaintiff in error, who filed an answer to the petition, to which there was a reply and a trial of the issues joined and a submission to the court, as a result of which, in the language of the record, "The said district court did, upon the 9th day of November, 1893, decide that said injunction ought not to have been granted and did make a decree accordingly," or, as stated in another portion of the record, "the plaintiff in error recovered a decree dissolving the injunction." We are thus particular in quoting the statements of the record in reference to the event of the trial for the purpose of showing that while it is disclosed that there was a trial of the matters in controversy, it does not very clearly appear whether a final disposition was made of the case or not, or the adjudication was confined to the dissolution of the injunction. The court, at the request of the plaintiff in the injunction suit, fixed the amount of a supersedeas bond, which was afterwards executed and filed, and a transcript and other necessary papers were filed in this court for the purpose of perfecting an appeal hereto from the decision of the trial court. At a later date it appears that there was an affidavit in the nature of an information filed in the district court, in which it was stated that plaintiff in error had been guilty of violations of the injunction, also setting forth portions of the prior proceedings in respect to the injunction, including the decision, the filing of the bond, and the appeal of the case to this court, the purpose being to procure his punishment for a contempt. Plaintiff in error was brought before the court to answer to the charges made in the complaint. There was filed for him a demurrer to the complaint which, so far as we care to notice it, was general, or questioned the sufficiency of the statements contained in the pleading, which, after argument and submission, was overruled,

O'Chander v. State.

there being no other or further pleas, either oral or written, made or filed so far as shown by the record. Upon the facts as they appeared in the information the court adjudged plaintiff in error guilty of contempt and to pay a fine of \$50 and the costs, and to do and perform certain acts set forth in the judgment, and in default of compliance with such requirements to be committed.

Errors alleged to have been committed by the trial court during the hearing on the charge of contempt are presented for our examination and determination. The petition for injunction, decree, and some other papers, including the bond which was given as an appeal bond, were attached to and made a part of the affidavit or complaint in the contempt proceedings. "Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein." (*Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903.) It is very evident that the charge of contempt depended upon the force and efficiency of the bond given to operate as a supersedeas and continue the injunction. The requirements of the law in relation to the bond and its conditions are contained in section 677 of the Code of Civil Procedure, and are as follows: "Fourth—When the judgment, decree, or final order dissolves or modifies any order of injunction which has been or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will pay all costs which may be found against him or them on the final determination of the cause in the supreme court, and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit and continue such injunction in force until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be and remain in ef-

fect until it is finally decided whether or not the injunction ought to have been granted." The condition in the bond in the case at bar was as follows: "Now, therefore, if the said Charles Holsworth, overseer of said road district No. six (6), of Dakota county, Nebraska, shall pay the amount of the decree, interest, damages, and costs against him in case the said decree shall be affirmed in whole or in part in said supreme court, then the above obligation to be void, otherwise to remain in full force and virtue." By comparison of the condition stated in the bond as given, with the requirements of the law applicable to such a bond as quoted it will at once be noticed that the bond in this case was not conditioned as the law prescribes, but a material portion was omitted. This rendered it insufficient as a supersedeas bond or to continue the injunction in force. (*State v. Thiele*, 19 Neb., 220.) This being true, it follows that the information in the contempt proceedings, based upon the continuance of the injunction by the effect of this bond as one of the necessary elements of the charge, and disclosing upon its face that the bond was so defective as not to fill the purpose for which it was intended, was insufficient to sustain the conviction and judgment predicated upon it, and that the demurrer to it should have been sustained. The judgment of the district court is

REVERSED AND PLAINTIFF IN ERROR DISCHARGED.

DAVID ZIMMERMAN V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. NO. 7079.

1. **Contempt: NATURE OF PROCEEDINGS.** A proceeding against a party for contempt in this state is in the nature of a criminal prosecution and governed by the rules of construction and practice applicable thereto.

Zimmerman v. State.

2. ——— : REVIEW OF PROCEEDINGS. A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases.
3. ——— : ———. In order to secure a review of errors committed during a trial in proceedings for contempt such errors must first be submitted to the court wherein such proceedings were had by a motion for new trial.
4. ——— : DEFECTS IN INFORMATION: PRACTICE. Formal defects in an information and warrant or order of arrest must be taken advantage of by objections made in the proper manner before going to trial, otherwise they will be deemed waived.
5. ——— : DISOBEDIENCE OF ORDER OF INJUNCTION. The proceedings in this case examined, and held fully within the jurisdiction of the trial court as conferred upon it by section 260, Code of Civil Procedure.

ERROR to the district court of Furnas county. Tried below before WELTY, J.

F. I. Foss and *W. R. Matson*, for plaintiff in error.

A. S. Churchill, Attorney General, *T. H. Matters*, and *C. J. Dilworth*, for the state.

HARRISON, J.

An action for an injunction was commenced in the district court of Furnas county by one Enos Clark against the Cambridge & Arapahoe Irrigation and Improvement Company to restrain it, or any person acting by, through, or under it, from diverting the waters of the Republican river from the natural channel, and upon the presentation of the petition on the 18th of June, 1894, to the judge of the district court for the allowance of a temporary injunction during the pendency of the suit, the matter of such allowance was set for hearing at 1 o'clock P. M. of the following day, and an order allowed restraining the company, or any person or persons acting by, through, or under it, from committing the acts complained of in the petition for injunction. On the 19th day of June, 1894, an affidavit

was filed in which it was charged that the plaintiff in error had been guilty of a contempt, consisting of a violation of the restraining order made in the injunction suit. He was arrested and brought before the court or judge, and as the result of a trial upon the charge, in the affidavit was convicted and sentenced, and to secure a reversal of the judgment these error proceedings have been prosecuted to this court.

The petition in error contains some assignments which refer to errors alleged to have occurred during the trial. It has been said by this court that a proceeding against a party for contempt is in the nature of a criminal prosecution. (*Gandy v. State*, 13 Neb., 445; *Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *O'Chander v. State*, 46 Neb., 10.) It was also determined in the case of *Gandy v. State*, *supra*, that "A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases." It would seem to follow that the rules of practice governing error proceedings should be adopted and made applicable to contempt cases where the issues are tried, and among them the one by which a party who desires a review of errors occurring during the trial of a case must file a motion for new trial pointing out such error. (*Davis v. State*, 31 Neb., 243.) There was no motion for new trial filed in this case, hence we cannot review any of the errors assigned which are alleged to have been committed during the trial. This includes the assignment of error regarding the insufficiency of evidence to support the finding and judgment.

There are some assignments which are directed toward what are alleged to be defects in the information and warrant, or order of arrest, in matters of form. These are questions which should have been raised by objections made in the proper manner before going to trial. This was not done, and, if they existed, they were waived. (*Davis v. State*, 31 Neb., 252.)

Chapman v. Garber.

There are some assignments of error in which it is alleged the judge was without authority of law to fine and imprison plaintiff in error, and was without jurisdiction to try and sentence him, and that the judgment was unlawful and void. The authority to entertain such a proceeding, to try the issues and render judgment, is conferred upon courts and judges thereof. (See Code of Civil Procedure, sec. 260.) The court had jurisdiction of the injunction suit and the judge had authority to make the restraining order, and its obedience was imperative so long as it remained in force, and upon complaint filed of its violation and the party being brought before the judge to answer the charge, upon the evidence adduced during the trial was determined guilty and a sentence imposed such as is contemplated or prescribed by law.

In such portion of the proceedings of the trial court or judge as are properly presented here for review nothing has been assigned or indicated in either the petition in error or argument for plaintiff in error which was erroneous, and the judgment must be

AFFIRMED.

GEORGE B. CHAPMAN V. W. S. GARBER.

FILED OCTOBER 1, 1895. No. 6144.

1. **Contribution: PRINCIPAL AND SURETY: PAYMENT BY RENEWAL OF NOTE.** If a note signed by a principal and two or more sureties is discharged by the execution and delivery of a new note executed by the principal and one of the sureties, and the surety is forced to pay the last note, this does not entitle him to, and he cannot, compel his co-surety or co-sureties on the first note to contribute. The execution and delivery of the second note was not a payment of the first note by the surety alone. It but effected a change in the form of contract.

2. ———: ———: ———. A promissory note to be executed for the

purpose of discharging a prior note signed by a principal and two sureties was presented by the principal maker to one of the sureties for his signature, it then bearing the signatures of the principal and other surety on the prior note. *Held*, In the absence of any agreement or understanding with his co-surety on the prior note in regard to his signing the second note as surety, he had the right to refuse to sign the second note, or he could sign it in such manner as to limit or modify his liability and make it other than that of a surety, and, if he did so sign it, the surety, being compelled to pay it, could not exact contribution from him.

3. **Negotiable Instruments: PRINCIPAL AND SURETY.** The opinion in the case of *Stump v. Richardson County Bank*, 24 Neb., 522, examined and distinguished.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

Davis & Hibner, for plaintiff in error.

Reese & Gilkeson, *contra*.

HARRISON, J.

The plaintiff in this action stated in his petition, in substance, that Al. E. Ewan, as principal, and the plaintiff and defendant, as sureties, of date July 13, 1889, signed and delivered to the Capital National Bank a promissory note in the sum of \$300, payable ninety days after date; that the note was not paid at its maturity, but was renewed, and the time of payment extended three several times, the last of which renewals was of date November 17, 1890, and before maturity of the last of the renewal notes the principal, Al. E. Ewan, became insolvent and absconded from or left the state, and on the 26th day of November the plaintiff paid the amount of indebtedness. The relief prayed for was judgment for \$150, or one-half the amount paid, with interest, or for contribution as co-surety. The defendant in his answer admitted signing as surety the note declared upon in plaintiff's petition; denied that there were

Chapman v. Garber.

any renewals of it, and further pleaded that it was paid in full by the principal maker, and that the other notes which were signed by plaintiff and defendant as sureties for Ewan were by him paid; that on August 16, 1890, Ewan, as principal, and plaintiff, as surety, signed a note in favor of the Capital National Bank for the sum of \$300, payable ninety days after date, which the defendant also signed as follows: "W. S. Garber, guarantying note good and collectible," and not as surety; that this note was paid November 26, 1890, by the plaintiff and he has sued the defendant in this action for one-half of the amount then paid. The reply of plaintiff is as follows:

"Comes now the plaintiff, and for reply to the defendant's answer herein filed—

"1. Admits that the defendant signed said note as surety and co-surety with the plaintiff, but denies that said note was paid by Al. E. Ewan, and alleges that said note was never paid, but was renewed from time to time until the same was paid by this plaintiff as alleged in his petition, and denies each and every allegation of new matter in said answer set forth."

The result of a trial in the district court, a jury being waived, was a judgment for defendant, to reverse which is the object of this error proceeding on behalf of plaintiff.

It appears from the evidence that the four notes were executed and delivered to the bank and that the second was a renewal or payment of the first, the third of the second, and the fourth of the third. That the first, second, and third were signed by plaintiff and defendant as sureties for Al. E. Ewan, the principal maker; that the fourth was signed by the principal and presented to the plaintiff, who signed and gave it to the principal, who presented it to defendant to sign; that defendant refused to attach his signature to it in the relation of surety, but did sign it in the manner we have hereinbefore indicated, after which the note was delivered to the bank and the third of the series

canceled and surrendered to the parties. It does not appear that there was any understanding or agreement between plaintiff and defendant in regard to signing the notes and their relative rights and positions created or to be established thereon. It is urged by counsel for plaintiff that if the indebtedness evidenced by the third note was extinguished or paid by the execution and delivery to the bank of the fourth, that, inasmuch as plaintiff signed the last note as surety and it paid the third, on which the defendant was his co-surety, the liability of the defendant to contribute to the payment was established by such satisfaction of the third note. This argument in behalf of plaintiff is not sound and the position assumed is untenable. If the fourth note, or the one by which the third was paid, had been the individual note of the plaintiff it would have been a payment by him and would have entitled him to contribution from defendant, but the fourth note being the obligation of the principal debtor and the plaintiff, and also signed by defendant, was not a payment of the debt by plaintiff and did not create the right in him to call upon the defendant for contribution. (*Bell v. Boyd*, 13 S. W. Rep. [Tex.], 232; the doctrine which is referred to with approval in *Smith v. Mason*, 44 Neb., 610.) It is further contended by counsel for plaintiff that inasmuch as plaintiff and defendant had signed the first note as co-sureties, and created the liabilities each to the other by such act of signing, it was not competent or within the power of defendant to alter or modify the existing liability as between him and his co-surety. Here we will again call attention to the facts attending the execution of the fourth note, or last of the series which figured in the transactions out of which arose the present controversy. There was no agreement or understanding between plaintiff and defendant in regard to signing any of the notes. When the last one was executed the principal and plaintiff attached their signatures to it and it was then entrusted to the principal to

Chapman v. Garber.

obtain that of the defendant, who refused to again sign as surety, but signed it in the manner herein shown, and not so as to be liable to plaintiff as a co-surety, and the note was then delivered to the bank and the third of the notes given was canceled and surrendered and this one took its place. The defendant had the right to refuse to sign the last note, or to sign it in the manner or with such restrictions as to liability as he chose or desired to make, and the plaintiff cannot recover against him in this action as a co-surety.

We are cited by counsel for plaintiff to the case of *Stump v. Richardson County Bank*, 24 Neb., 522, and it is insisted that the rule therein announced is applicable to the facts and circumstances developed in the case at bar and decisive of the questions involved. A careful reading of the case referred to convinces us that it does not conflict with the rule announced herein. It must be borne in mind that in all cases of this nature the actual intention of the parties to an instrument, or the actual relationship which exists, may be shown, regardless of the form which the transaction may have assumed or which may have been attempted to place upon it, and in the case of *Stump v. Richardson County Bank*, *supra*, this doctrine was applied: That there were no facts proved tending to establish a change in the relationship between the parties litigant at the making and indorsing of the first note prior to or at any renewal of it, the change made being merely in a matter of form. In the case at bar the facts show both an intention to change the relationship and an expression of the intention in the form of signature, and to make a change which it was entirely competent and within the power of defendant to make if he so desired. The judgment of the district court is

AFFIRMED.

FRED GROSSMAN V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7713.

1. **Criminal Law: STATEMENTS OF COUNSEL: EVIDENCE: REVIEW.** Mere statements made by a counsel in the course of an argument, even though contained in a bill of exceptions, cannot be considered as evidence of the facts so stated.
2. **Conflicting Evidence: REVIEW.** Facts determined upon consideration by the district court of contradictory affidavits will be presumed by the supreme court to have been fully established by the proofs.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J.

R. D. Stearns, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

RYAN, C.

The plaintiff in error was convicted in the Lancaster county district court of unlawfully and feloniously receiving stolen property of the value of \$63.

The first error argued is that the court erred in ordering five talesmen to be called to fill the panel. The grounds of objection alleged to this procedure are that in the first instance the court, upon request, had directed a special panel to be drawn, and before this panel was exhausted had required the sheriff to call talesmen for the trial of this cause. In the bill of exceptions we find a *venire facias* requiring the sheriff to summon twenty persons named to serve as petit jurors. This was served upon eighteen of the persons named and required their attendance forthwith. This *venire* was issued and served February 19, 1895, and on the same day the jury in this case was impaneled. The record of the proceedings of the court in this trial recited

that "the impaneling of the jury herein was entered upon, and the regular panel of petit jurors being exhausted and the jury in the case not being complete, it is by the court ordered that the sheriff of Lancaster county be, and he is hereby, ordered to call talesmen qualified to serve as jurors in this case, to which the defendant duly excepts," etc. There was no affidavit filed as to what proceedings were in fact had in court. The bill of exceptions recites what was said by the counsel for the plaintiff in error, to the effect that while twenty persons had been summoned but three were present; that the court had excused jurors from the panel without counsel for the accused being present or having knowledge of that fact. These statements of the counsel, while they may have been in fact true, were not evidence. This being the case, we have before us no proof of the existence of the facts showing the alleged abuse of discretion by the district court.

There are matters complained of, for instance, the permitting of outbursts of applause, the separation of one juror from the others contrary to the direction of the court in that regard, and the fact that there was an earnest conversation between the county attorney and a juror before the trial was concluded and after its commencement. It is a sufficient answer to this class of objections to say that these matters were matters of fact considered and determined by the district court upon conflicting evidence and that there is perceived no reason for interfering with the conclusions reached.

The evidence adduced by the state was amply sufficient to justify the conviction complained of if the jury believed it in preference to that offered by the plaintiff in error in contradiction.

We find no errors in regard to the instructions as given or as refused. Indeed, if in any single one there was error we would be powerless to review it, for all the instructions were grouped in two classes in the assignment of er-

Bowen v. State.

rors in the motion for a new trial,—the one pertaining to instructions given; the other, to those refused.

The record has been carefully examined and re-examined in the light of the brief presented by the plaintiff in error, but without any substantial ground of complaint being found. The judgment of the district court is

AFFIRMED.

WILLIAM BOWEN V. STATE OF NEBRASKA ET AL.

FILED OCTOBER 1, 1895. No. 7370.

1. **Review:** STIPULATION FILED BELOW AFTER JUDGMENT. A stipulation of the facts filed in the district court after its judgment has been rendered cannot be considered upon proceedings for the review of such judgment in the supreme court.
2. ———: **RECORD.** Where the questions presented in error proceedings are dependent upon the existence of certain facts there can be no review of such questions in the absence of a showing that any evidence was introduced upon the trial in the district court.

ERROR to the district court for Holt county. Tried below before KINKAID and BARTOW, JJ.

H. M. Utley, for plaintiff in error.

H. E. Murphy, *contra*.

RYAN, C.

The district court of Holt county fixed the penal sum of the bond of Barrett Scott at \$70,000 in a prosecution therein pending. Upon an application for a writ of *habeas corpus* this court held the penal sum named not excessive. (*In re Scott*, 38 Neb., 502.) The petition in the case now under consideration was filed December 4, 1893, in said

Bowen v. State.

district court by the defendants in error and an injunction allowed December 6 to prevent the release of Barrett Scott by plaintiff in error, the county judge of said county, upon a recognizance proposed to be by him approved. From the answer found in the record it appears that the county judge of Holt county, at the time the petition was filed, was taking steps toward admitting Barrett Scott to bail in the sum above named. It does not appear, however, when this answer was in fact filed nor that it ever was filed. The reply was filed December 11, 1893. A stipulation was filed December 12, 1893, in which it was admitted that the district court of Holt county was in session November 27, 1893, and was transacting business, and on that day took a recess until the 5th day of December, 1893, and that at the time of the taking of the bond of Barrett Scott both judges of said district court were absent from Holt county and were holding court in the counties of Sheridan and Dawes in said district, and that at the time of the filing of the stipulation the September term of the district court of Holt county had not yet adjourned. While the stipulation was filed December 12, 1893, the trial was had and decree entered on the day previous. A motion in the nature of a motion for a new trial was overruled on December 12, 1893, from which we are led to infer that the stipulation above referred to was perhaps filed after the said motion was passed upon. However this in fact may be, it is clear it was not filed early enough to have received consideration upon the trial. The record purports to contain a bill of exceptions, but we can find nothing of the nature of evidence except the stipulation to which reference has already been made. We cannot, therefore, determine this error proceeding upon the facts, and these being eliminated, no question remains for our consideration. The judgment of the district court is, therefore,

AFFIRMED.

JOHN B. WALKER V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6887.

1. **Homicide: DEFENSE OF INSANITY: TRIAL.** Where insanity or lunacy has not originated since the offense charged is alleged to have been committed, there is no requirement that the existence of such lunacy or insanity should be determined by a jury impaneled to determine whether or not the accused is of sound mind.
2. **Murder: PENALTY.** The offense charged having been committed before chapter 44, Session Laws, 1893, went into effect, it was not necessary that the jury in the verdict of guilty should fix the penalty which should be inflicted.

ERROR to the district court for Dawson county. Tried below before HOLCOMB, J.

C. W. McNamar, for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state.

RYAN, C.

Plaintiff in error was, in the district court of Dawson county, convicted of murder in the first degree. There was no controversy as to the fact of the homicide. The principal questions raised were as to the insanity of the accused when the act was committed and when the trial took place. When the arraignment was about to be had there was a showing of the probable unsoundness of the mind of the prisoner, to such an extent that he could not assist in the conduct of his defense, wherefore it was insisted that he should not be required to plead or enter upon his defense until a jury should be impaneled and a trial be had as to his insanity. Upon the showing made, including an examination by the court of the accused, the court found and entered of record his finding that "the defendant un-

derstands the nature of the charge made against him, and that he is competent to make his defense in the action and competent to plead to the information filed against him." The court further found that the question of the sanity of the accused was properly triable upon a plea to the information. This was on the 12th day of September, 1893, and on the 23d of November thereafter, immediately following, the court further found "that no other or different causes or reasons exist therefor [that is, as to prisoner's sanity] than heretofore presented to the court, that the alleged insanity, if existing, began and was existing prior to said homicide, and did not occur since the commission of the alleged homicide, and is a matter properly triable upon the main issue in the case." As facts, these findings were fully sustained by the evidence submitted. Counsel for the plaintiff in error cites but two sections of the statute in his argument upon the right to have tried by a jury the question of insanity before being compelled to plead to the information or make a defense against its charges. Of these sections the first cited (Criminal Code, sec. 553) applies solely to the sanity of the person under sentence of death. The other (Criminal Code, sec. 454) is limited to persons who become lunatic or insane after the commission of the offense. In each of these classes a jury trial must already have been had before insanity supervened so that otherwise than by the methods provided in the above sections no trial to a jury of the fact of his insanity or lunacy could be had by the person under conviction. Where, however, the alleged insanity or lunacy is claimed to have been in existence before trial upon information is begun, the legislature probably assumed that no provision for an independent trial of the question of sanity was necessary, therefore no such provision was made for such an independent trial. In the absence of such a provision of the statute we can perceive no reason which would justify the district court in submitting twice to a jury the question of

the insanity or lunacy of the person accused of a criminal offense. The evidence was not so clearly wanting to sustain the verdict of the jury, sanctioned as it was by the refusal of the district court to grant a new trial, that this court should interfere and by a reversal set aside the judgment of the district court, even though as an original proposition we might believe the plaintiff in error at the time of the homicide was of unsound mind.

All the instructions given were by the motion for a new trial, as well as by the petition in error, criticised in a single group. In a case of ordinary importance it would be sufficient to note this fact as affording a sufficient reason for disregarding this assignment if there was found in the group a single instruction not open to criticism. Treating this assignment, however, as a challenge of the correctness of the instructions as a whole, we are unable to agree with the counsel for the plaintiff in error in his somewhat technical criticisms. We have, however, gone a step further and have examined each instruction separately, and have been able to find no substantial ground of complaint in either of them.

It is insisted that the jury should have fixed the penalty in the verdict in accordance with the provisions of chapter 44, Laws, 1893. The provisions of that act in terms are restricted to any person who shall after its passage commit one of the crimes therein described. The act in question had no emergency clause and was approved April 8, 1893, so that at the time the homicide was committed (May 11, 1893) chapter 44 aforesaid was not yet in effect. There was, therefore, no requirement that the jury in this case should fix the penalty which should be inflicted upon the plaintiff in error. The judgment of the district court is

AFFIRMED.

January 10, 1896, fixed for the execution of the sentence imposed by the district court.

JOHN P. HEALD ET AL. V. POLK COUNTY.

FILED OCTOBER 1, 1895. No. 5704.

1. **Office and Officers: COMPENSATION.** When the law prescribes the duties of a public officer and fixes the compensation of such officer he must perform all the duties required of him by the law for such compensation. *State v. Silver*, 9 Neb., 85, and *Bayha v. Webster County*, 18 Neb., 131, reaffirmed.
2. **County Clerks: COMPENSATION FOR MAKING TAX LISTS.** By the statute in force in 1883 county clerks of counties having less than 25,000 inhabitants were required as a part of the duties of their office to make out the tax lists of such counties for said year, and for this service such clerks were not entitled to any extra compensation.
3. ———: ———: **FEES: COUNTY BOARDS: ALLOWANCE OF CLAIMS.** The county clerk of such a county in the year 1883 duly made report to the county board of all fees received by him as such clerk for said year. Such report was by the county board approved, and the clerk retained of the fees collected \$1,500, that sum being his compensation as fixed by the law. Said clerk duly filed a claim of \$200.24 against said county for making out the tax list of the county for said year, which claim was duly audited by the county board and paid to said county clerk. In a suit by the county against the clerk and the sureties on his official bond to recover this sum, *held*, (1) that the county board, in examining the reports made to it by said clerk of fees received by him as such officer, and in adjusting the account between the county and said clerk, exercised ministerial functions only (*Kemerer v. State*, 7 Neb., 130, and *State v. Roderick*, 25 Neb., 629, limited and reaffirmed); (2) that the action of the county board in examining and adjusting the reports made to it by the clerk of fees received by him for the year 1883, and its action in allowing the clerk the claim filed against the county for making the tax list, were independent transactions; (3) that the county board, in passing upon the claim filed against the county by the clerk for making up the tax list, exercised judicial functions, and its decision in the premises not having been appealed from was final; (4) that the fact the claim presented by the clerk for making up the tax list was without merit, and was one for which the county was not legally liable, did not oust the county board of jurisdiction in the premises.

4. **Counties: COUNTY BOARDS: CLAIMS: ALLOWANCE: RES ADJUDICATA.** The counties of this state are bodies corporate and politic. Their powers as such bodies are exercised by their county boards. Such boards are invested with exclusive, original jurisdiction to hear and determine, to allow or disallow, all claims filed against their counties. In passing upon such claims they act judicially and their decisions in the premises are conclusive unless appealed from.

ERROR from the district court of Polk county. Tried below before BATES, J.

Holmes, Cornish & Lamb, for plaintiff in error, cited: *Dixon County v. Barnes*, 13 Neb., 294; *Brown v. Otoe County*, 6 Neb., 111; *Bowers v. Rice*, 19 Neb., 578; *Lamb v. Briggs*, 22 Neb., 144.

Harry M. Marquis, County Attorney, contra, cited: *State v. Silver*, 9 Neb., 85; *State v. Ream*, 16 Neb., 681; *Palo Alto County v. Burlingame*, 32 N. W. Rep. [Ia.], 259; *Board of County Commissioners v. Sheehan*, 43 N. W. Rep. [Minn.], 690; *Chicago, B. & Q. R. Co. v. Bernard*, 32 Neb., 306; *Thompson v. Pioneer Press Co.*, 33 N. W. Rep. [Minn.], 861; *Bowers v. Rice*, 19 Neb., 578; *McNamara v. Cabon*, 21 Neb., 590; *Black v. Cabon*, 24 Neb., 248; *Marsh v. Snyder*, 14 Neb., 8; *Lewis v. Watrus*, 7 Neb., 477; *Crowell v. Johnson*, 2 Neb., 156; *Wausau Boom Co. v. Plumer*, 5 N. W. Rep. [Wis.], 54.

RAGAN, C.

John P. Heald was the duly elected, qualified, and acting county clerk of Polk county during the year 1893. This suit was brought by Polk county against Heald and the sureties on his official bond as such clerk to recover \$200.24 fees which it is alleged Heald collected and retained as county clerk for said year in excess of the compensation allowed him by law for services rendered as such clerk for such year. Polk county had a verdict and judg-

Heald v. Polk County.

ment and Heald has prosecuted to this court a petition in error.

The undisputed evidence in the case is that Polk county in the year 1883 had a population of less than 25,000 inhabitants; that Heald made out the tax list of said county for said year, and made out and filed with the board of commissioners of said county his claim against it for \$200.24 for making out such tax list; that such claim was duly audited, a warrant drawn on the treasurer in favor of Heald for said amount and the same duly paid; that Heald made a report to the county authorities of all the fees received by him for the year 1883 as such county clerk, except this item for making up the tax list; that the county board examined his reports, approved the same, and allowed him to retain fees, besides the tax list item, to the amount of \$1,500 for said year. The law in force at that time fixed the compensation or salary of county clerks of counties having less than 25,000 inhabitants at \$1,500 per year. There was no law in force in that year which allowed county clerks in counties having less than 25,000 inhabitants any extra compensation for making tax lists. The law then in force fixing the compensation of such county clerks was section 1 of an act passed and approved February 15, 1877, and which took effect January 1, 1878. This law limited the compensation of such county clerks to \$1,500 per year, and required them to account and pay over to the county all fees received by them in excess of said sum of \$1,500. When the law prescribes the duties of a public officer and fixes the compensation or salary of such officer by the year, then such officer must perform all duties required of him by law for the compensation fixed. (*State v. Silver*, 9 Neb., 85; *Bayha v. Webster County*, 18 Neb., 131.) At the time Heald qualified for the office of county clerk, and before that time, the law made it the duty of county clerks of counties having less than 25,000 inhabitants to make out the tax lists of their counties for

each year. This was not extra work. It was as much a part of his duty to make out the tax lists because he was county clerk as it was his duty to file chattel mortgages brought to his office for that purpose. By section 44, chapter 28, Compiled Statutes, 1893, it is provided that the county clerk, and other officers, shall keep a book to be known as a fee-book, in which he shall enter each and every item of fees collected by him, the name of the party from whom he received the fee, the time of receiving the same, the amount received, and for what service the fee was charged. And by section 43 of said chapter it is made the duty of such county clerk, on the first Tuesday of January, April, July, and October of each year, to make a report under oath to the county board showing the different items of fees received by such officer for services performed by virtue of his office. And by section 45 of said chapter it is provided, that if the clerk shall omit to comply with said sections 43 and 44 he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined; and if he shall make a false report under oath he shall be guilty of perjury and punished accordingly. By section 43, chapter 18, Compiled Statutes, 1893, it is provided that all persons chargeable with money belonging to any county shall render their accounts to and settle with the county board at the time required by law, and pay into the county treasury any balance which may be due the county and take receipts therefor.

In *Kemerer v. State*, 7 Neb., 130, it was held that a county board, in examining the reports made to it by county officers and in settling the account between such officers and the county, exercised ministerial functions only. This case was approved and followed in *State v. Roderick*, 25 Neb., 629. Following and relying upon these decisions, the argument of the county here is that the \$200.24 allowed by the county authorities of Polk county to Heald for making the tax list constituted part

Heald v. Polk County.

of the fees which he received in the year 1883 for services rendered by him as such county clerk, and which fees it was his duty to report to the county board and account for. We cannot adopt this argument. The law, it is true, required the county clerk to report to the county board all fees which he had received for services performed by him as such officer; but the fees which the clerk was required to account for was the compensation prescribed by law for the service rendered by him as such county clerk—the legal fees which he was authorized by law to charge and collect. As already stated, he was not entitled to any fee for making out the tax list for the year 1883. The money appropriated to Heald by the county board for making the tax list was in the nature of a gratuity, or donation. But whatever may be the character of this claim allowed to Heald by the county board, such claim was not a fee prescribed by law as a compensation to Heald for a service he had performed as such county clerk.

Another argument of the county is that the allowance by the county board of Heald's claim of \$200.24 for making out the tax list for the year 1883, and the examination and approval of the reports made by him of the fees collected as county clerk for the year 1883, were parts of one and the same transaction, and that since the county board exercised only ministerial functions in examining Heald's reports and adjusting his accounts with the county, the board exceeded its authority in allowing Heald \$200.24 for making out the tax list, as by that act the board increased the salary or compensation allowed Heald as clerk for the year 1883 by that amount; and that the board had no jurisdiction or authority to so increase the compensation of Heald and that its action in that respect was simply void. We think the cases last cited above from the 7th and 25th Nebraska, in so far as they hold that a county board exercises only ministerial functions in its examination of the reports of county officers and in settling and adjusting the accounts

between such officers and the county, are correct. It is provided by the statutes (see Compiled Statutes, 1893, secs. 43, 44, 45, art. 1, ch. 18) that persons chargeable with money belonging to any county shall render their accounts to and settle with the county board and pay any balance which may be found due into the county treasury; and if any person shall refuse to render true accounts or settle, the county board shall adjust the accounts of such delinquents according to the best information it can obtain, ascertain the balance due the county, and institute a proper action to recover such balance; and in such suit the delinquent shall not be entitled to any commission and shall forfeit and pay to the county a penalty of twenty per cent of the amount found due the county; and that it shall be the duty of the court in which any such action is brought to include such penalty in the judgment rendered. It is evident from this statute that the finding made by a county board in adjusting the accounts of an officer with his county is not conclusive upon either the officer or the county; but in a suit by a county against an officer to compel him to pay over fees collected the finding of the county board, made upon an examination and settlement of such officer's reports to it of the amount due from the officer to the county, is at most *prima facie* evidence of the correctness of the status of the account between the officer and the county. But the holding of said cases last cited should not be extended beyond the point stated and they are not applicable or controlling under the facts in this case. The action of the county board in examining the four reports made to it by Heald of fees received by him as county clerk for the year 1883, the approval of such reports and the adjusting of the accounts of Heald with the county, and its action in allowing the claim Heald filed against the county for making the tax list, were not parts of one and the same transaction. Heald had no valid claim against this county, and it may be conceded that the allowance made by the board

Heald v. Polk County.

of his claim for making the tax list was a mere shift and device resorted to by the board for the purpose of increasing Heald's compensation as county clerk. The allowance of this claim was contrary to law and the money was appropriated for an unlawful and unauthorized purpose; and each member of the county board who voted for such appropriation may have thereby rendered himself and the sureties on his official bond liable to the county for the money so misappropriated. The members of county boards are trustees and agents of the public charged with the performance of certain duties and invested with certain powers, and among these is that of conserving the public funds and paying them out only for lawful purposes; and when a county board appropriates the money of the public for any purpose, its members must know at their peril that such purpose is one authorized by law. But by section 20, article 1, chapter 18, Compiled Statutes, 1893, each county in this state is declared to be a body politic and corporate; and by section 21 of said chapter it is declared that the powers of a county as a body corporate or politic shall be exercised by a county board; and by subdivision 3 of section 22 of said article and chapter it is declared that the county board shall have power to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers; and by subdivision 5 of section 23 of said article and chapter the county boards are given power to examine and settle all accounts against the county and all accounts concerning the receipts and expenditures of the county. By section 37 of said article and chapter it is provided that before any claim against a county is audited and allowed such claim shall be verified by the oath of the claimant or his agent and filed with the county clerk, and that if the claim be disallowed in whole or in part, the claimant may appeal from the decision of the board to the district court; and by section 38 of said article and chap-

Heald v. Polk County.

ter it is provided that any taxpayer of the county may appeal from the allowance of any claim against the county. This court has many times construed these statutes, and it has been uniformly held that a county board is invested with exclusive original jurisdiction to hear and determine, to allow or disallow, all claims filed against the county; that a county board, in passing upon a claim filed against the county, acts judicially, and that its decision in the premises, if unappealed from, is final. (*Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Dixon County v. Barnes*, 13 Neb., 294; *Ragoss v. Cuming County*, 36 Neb., 375; *State v. Churchill*, 37 Neb., 702; *Sioux County v. Jameson*, 43 Neb., 265.)

In this action the county seeks to recover from Heald money paid to him on a claim filed by the latter against the county. This claim was duly verified by Heald, filed with the county clerk, examined by the county board and allowed, and as no appeal was taken from this action of the county board, this suit cannot be maintained. The claim ought not to have been presented to the county, as it did not owe Heald anything, and the board was quite as well aware of this as was Heald himself; but the fact that the claim presented was without merit, or was one for which the county was not legally liable, did not oust the county board of jurisdiction in the premises. Jurisdiction is authority to hear and decide. There were two parties to this proceeding, Heald and the county. There was an issue made by the filing of the claim, namely, whether the county was liable for the claim, and there was a judgment that the county was liable and that Heald should recover. Here then was not only jurisdiction, but on the part of the board judicial action and the exercise of judicial discretion. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

F. W. RAGOSS ET AL. V. CUMING COUNTY.

FILED OCTOBER 1, 1895. No. 5778.

County Clerks: FEES: ALLOWANCE OF CLAIMS BY COUNTY BOARDS. The facts and the questions of law involved in this case are in all respects similar to those involved in *Heald v. Polk County*, 46 Neb., 28, decided herewith, and on the authority of that case the judgment of the district court rendered herein is reversed.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

J. C. Crawford, M. McLaughlin, and T. M. Franse, for plaintiffs in error.

H. C. Brome and P. M. Moodie, contra.

RAGAN, C.

The county of Cuming brought this suit in the district court of that county against F. W. Ragoss, as principal, and the sureties on his official bond as county clerk, to recover the amount of certain fees which the county alleged Ragoss, during his term of office, had collected for services performed by him as such clerk and had retained in excess of the amount which he was allowed by law to retain for the services performed by him as such clerk. The county had a verdict and judgment, and Ragoss and the sureties have prosecuted to this court petitions in error.

It appears that during the time Ragoss was in office he made up the tax lists for the county, made out the road supervisor's books, canvassed election returns, and performed other services which, under the law as it then existed, it became his duty to perform without any extra compensation over and above the salary or compensation attaching to the office of county clerk. For these extra services per-

Collins v. State.

formed by Ragoss he filed his claims with the county clerk of said county. These claims were audited and approved by the county board of said county, warrants drawn therefor in favor of Ragoss on the treasurer and by him paid. The suit is in effect one by the county to recover back this money unlawfully paid by it to Ragoss for such extra services performed by him. The facts and the questions of law involved are in all respects similar to those involved in the case of *Heald v. Polk County*, 46 Neb., 28, and following that case the judgment here must be reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD J. COLLINS V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7572.

1. **Criminal Law: WITNESSES: RE-EXAMINATION.** As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination; but whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the trial judge. (*Schlenker v. State*, 9 Neb., 241.)
2. ———: ———: ———. It is competent for a witness on his redirect examination to make clear or complete matters left obscure or incomplete by his answers on cross-examination.
3. ———: **RULINGS ON EVIDENCE: OBJECTIONS: REVIEW.** In reviewing the rulings of the trial court in receiving and rejecting evidence this court will confine its examination to the objections made at the trial. (*Hill v. State*, 42 Neb., 503.)
4. ———: **EVIDENCE: DYING DECLARATIONS.** Dying declarations, to be admissible, must be made under a sense of impending death; but it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony. (*Fitzgerald v. State*, 11 Neb., 577.)

5. ———: ———: RES GESTÆ. The term "*res gestæ*" means things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based.
6. ———: ———: ———. The declaration of an injured person, who subsequently dies from such injury, as to the cause of his injury, though made out of the presence of the party accused of inflicting such injury, and made under such circumstances as not to be admissible as the dying declaration of the deceased, is, nevertheless, competent evidence as part of the *res gestæ*, provided the declaration was made so near the time of the infliction of the injury and under such circumstances as to raise the presumption that it is an unpremeditated explanation thereof.
7. ———: ———: ———. Whether the declaration of a person, since deceased, is competent evidence, as being part of the *res gestæ* of some transaction occurring in the life of said deceased, in any case, must be determined from the facts and circumstances surrounding the case on trial.
8. **Homicide: DYING DECLARATIONS: RES GESTÆ.** One McPherson about midnight was wounded by a pistol shot, of which wound he died a few days afterwards. At the time of the shooting he and one Dale were stealing coal from a railroad yard. McPherson was found insensible, where shot, shortly afterwards, but soon thereafter regained consciousness. He was then removed to a hotel near by and his wound dressed. About two hours and a half after the shooting he stated to those in attendance upon him at the hotel that "Dale had shot him accidentally." It did not appear from any statements of McPherson, or other evidence, that when he made said declaration he was possessed of the conviction that he was mortally wounded and about to die. No inquiries were made of McPherson by those who found him in the railroad yard, while there, as to how he came to be shot. McPherson made no statements while in the railroad yard as to who shot him. It was not made to appear that McPherson was unable to speak while in the yard after regaining consciousness and before being removed; nor was it made to appear that he lost consciousness or became unable to speak at any time after reaching the hotel and before the making of such declaration. On the trial of one Collins for the murder of McPherson the prisoner offered in evidence McPherson's declaration above quoted. *Held*, (1) that the declaration was not competent evidence as the dying declaration of McPherson; (2) that the declaration was not made so soon after the shooting and under such circumstances,—all the facts and cir-

Collins v. State.

cumstances of the case considered,—as to raise the presumption that the declaration was the unpremeditated explanation of the shooting, and that, therefore, it was incompetent evidence as part of the *res gestæ*.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Joseph R. Clarkson, for plaintiff in error.

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *H. H. Baldrige*, for the state.

RAGAN, C.

For the shooting and killing of one Louis McPherson Edward J. Collins was convicted in the district court of Douglas county of the crime of murder in the second degree and sentenced to the state penitentiary for life. Collins brings the judgment pronounced against him here for review, and seeks its reversal for alleged errors committed by the trial court.

1. On the trial the state called as a witness one Bennett, the sheriff, who amongst other things testified that after a conversation with one Dale he arrested the prisoner. Bennett, on his cross-examination by counsel for Collins, testified as follows:

Q. After you heard Dale's story and after you had arrested Collins you felt suspicious, didn't you?

A. I did, for two reasons.

Q. You did feel suspicious of him?

A. Yes, sir.

Bennett, on his redirect examination by the state, was then asked: "What were your reasons?" [for being suspicious.] This question counsel for Collins objected to. The objection was overruled and the witness answered. The first reason was, Mr. Dale seemed to be very open in his remarks and he didn't care how he talked. The other rea-

son was, Mr. Collins was very close-mouthed and very careful what he said. The ruling of the court in permitting this question to be answered is the first error assigned here by Collins. In *Schlenker v. State*, 9 Neb., 241, it was held: "As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination; but whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge." Whether the evidence elicited from Bennett on his cross-examination was competent and would have been permitted, had objection thereto been made by the state, we do not decide; but it is clear that the redirect examination of Bennett was limited and directed solely to the facts of Bennett's suspicions at the time he made the arrest of Collins as brought out on his cross-examination. It is competent for a witness on his redirect examination to make clear or complete matters left obscure or incomplete by his answers on cross-examination. The court did not abuse its discretion in permitting the question to be answered, and it was proper and competent evidence tending to explain and make complete facts elicited from Bennett on his cross-examination which were left incomplete and obscure. The assignment is, therefore, overruled.

2. On his direct examination a witness for the state was asked: "What, if anything, did you hear defendant Ed. Collins state previous to the shooting in this case about there being too much stealing done in and about Valley and he was going to put a stop to it?" The prisoner's counsel objected to this question as leading, and thereupon the trial court said: "You may repeat his language if you know. State what he said." The prisoner excepted and the witness answered. The ruling of the court in permitting this question to be answered is the second assignment of error urged here. It is to be observed that the only objection made to the question was that it was leading. The trial judge, in effect, sustained this objection and himself put to

the witness the question: "You may repeat his language if you know. State what he said." No objection was interposed to the question as actually put by the court and answered by the witness. "In reviewing the rulings of the trial court in receiving and rejecting evidence this court will confine its examination to the objections made at the trial." (*Hill v. State*, 42 Neb., 503.) For the reason that no objection was made in the court below to the question actually put to and answered by the witness, the assignment of error is overruled.

3. It appears from the record that the deceased was shot in a railroad yard in the town of Valley, somewhere near midnight of the 18th of November, 1893. Shortly afterwards he was found lying on the ground, where shot, in an unconscious state of mind, with a bullet hole in his head. About thirty minutes after he was found, and while he was still in the railroad yard, he regained consciousness and was soon afterwards removed to a hotel where he was washed and put to bed,—a man named Ball being in attendance upon him in the hotel. Ball was called as a witness for the prisoner and testified that McPherson, while in the railroad yard, made no statements as to how he happened to be shot. Counsel then asked Ball this question: "Did he [McPherson], while you were present at the hotel, after he had recovered so as to be able to talk, state the manner of his shooting?" This question the state objected to. The court sustained the objection and the prisoner excepted. The witness then testified that at no time while he was present with McPherson was anything said by him about the likelihood of his dying, or which indicated that he thought he was dying or fatally wounded.

4. The prisoner then made the following offer of proof under the question asked Ball and which the court refused to permit him to answer: "Defendant offers to prove by this witness that McPherson, the deceased, at the Reid Hotel, in the presence of the witness and others, stated, when

questioned regarding the manner in which he was shot, and the person by whom, that his partner had shot him and that he thought it was accidental and that he laid no blame on him." This offer was objected to by the state and the court said: "If you will show on the part of the defendant that the deceased was laboring under the belief or conviction that he was going to die, you may introduce that testimony." The prisoner made no such showing and the court sustained the objection to the testimony offered, to which the prisoner excepted. This ruling of the court is the third assignment of error alleged here. In *Fitzgerald v. State*, 11 Neb., 577, it is held: "Dying declarations, to be admissible in evidence, must be made under a sense of impending death; but it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony." To the same effect see *Rakes v. People*, 2 Neb., 157. The record before us does not disclose by the statements of McPherson or other evidence that the declaration offered in evidence was made by him while possessed of the conviction that he was mortally wounded and about to die. It is clear then that the evidence was not competent as being the dying declaration of the deceased. But it is strenuously and ably insisted by the prisoner's counsel that this evidence was a part of the *res gesta*, and as such competent. This term *res gesta* means something done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based. In this case the *res gesta* was the shooting of McPherson. Was the declaration made by him at the hotel as to who shot him so connected with the shooting, and such an element thereof, as to come within the legal definition of a part of that transaction?

The authorities are all agreed that the declaration of an injured person, who subsequently dies from such injury, as to the cause of his injury, though made out of the presence

of the party accused of inflicting such injury, and made under such circumstances as not to be admissible as the dying declaration of the deceased, is, nevertheless, competent evidence as part of the *res gesta*, provided the declaration was made so near the time of the infliction of the injury and under such circumstances as to raise the presumption of its being the unpremeditated explanation thereof. (See the rule stated and the authorities cited in 21 Am. & Eng. Ency. of Law, 102-111.)

"*Res gestæ* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. * * * Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act and are not produced by the calculated policy of the actors." (1 Wharton, Law of Evidence [3d. ed.], sec. 259.)

In *State v. Garrand*, 5 Ore., 216, it was held: "To make declarations a part of the *res gestæ* they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at the time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous."

If declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*. (21 Am. & Eng. Ency. of Law, 102, and cases there cited.)

But how close in point of time to the infliction of an injury, and under what particular circumstances a declaration must be made by an injured person, as to the cause of the injury, to make such declaration a part of the *res gestæ*, the authorities are by no means harmonious.

In *Fulcher v. State*, 13 S. W. Rep. [Tex.], 750: "The deceased was shot in the neck and his articulation was affected by blood collecting in his throat. About fifteen minutes after he was shot, brandy and camphor were administered, and about fifteen minutes afterwards he was able to talk and made certain statements as to the circumstances of the shooting and who shot him, and it was held that the declaration was admissible as part of the *res gestæ*."

In *Lewis v. State*, 15 S. W. Rep. [Tex.], 642, a declaration made by the deceased about an hour and a half after the infliction of the wound from which she died, that defendant had come up behind her, pulled her backward, and cut her nearly in two, was held competent evidence as part of the *res gestæ*. It appeared that the woman was ignorant and had not spoken except in a scream after she was wounded, and it was therefore held that the declaration was apparently voluntary and spontaneous. To the same effect are *Castillo v. State*, 19 S. W. Rep. [Tex.], 892; *Moore v. State*, 20 S. W. Rep. [Tex.], 563; *Pool v. State*, 23 S. W. Rep. [Tex.], 891; *Pitcher v. State*, 25 S. W. Rep. [Tex.], 24.

In *Commonwealth v. Wernitz*, 29 Atl. Rep. [Pa.], 272, it was held: "Declarations by the deceased to the police surgeon, who dressed his wounds after he had been carried across the street from where he was wounded and while his wounds were being dressed, as to who stabbed him are admissible as part of the *res gestæ*."

In *Travelers Ins. Co. v. Mosley*, 8 Wall. [U. S.], 397, the insurance company issued an accident policy to Mosley for \$5,000, in favor of his wife. By the terms of the policy the company was not to be liable for any injury suffered

by Mosley which arose from a natural disease, and was not to be liable for his death from injury unless the injury produced his death within three months after the date of its occurrence. Mosley's wife sued the insurance company for the full amount of the policy, alleging that on the 21st of July, 1866, her husband accidentally fell down stairs and was thereby injured and died thereof within three months of that time. At the trial Mrs. Mosley testified that in the night (Wednesday) her husband got out of bed and went down-stairs. She did not know how long he was gone. When he came back he told her he had fallen down-stairs and almost killed himself; that he had hit the back of his head in falling; that he complained of his head and appeared faint and vomited. This conversation occurred on Wednesday night. She also testified that on Thursday morning her husband said he felt bad. The son of the deceased testified that about 12 o'clock on Wednesday night he saw his father lying with his head on the counter and asked him what was the matter and the father replied that he had fallen down-stairs and hurt himself. The son further testified that on Thursday his father said to him that he felt bad, and if he attempted to walk across the room his head became dizzy. These declarations of the widow and son of the deceased were objected to as incompetent. The objections were overruled. Mrs. Mosley had a verdict and judgment, and the insurance company assigned in the supreme court of the United States that the admission in evidence of these declarations was error, but that court held that the declarations were competent as part of the *res gestæ*.

Missouri P. R. Co. v. Baier, 37 Neb., 235, was an action by the administrator of Mrs. Baier against the railroad company for negligently causing her death. On the trial a witness testified that he was standing on the platform in front of the depot when the train pulled in; that the car was uncoupled and the train pulled out, and a few

minutes afterwards he heard a scream, and going to the place where he heard the outcry found Mrs. Baier lying on the platform with her legs cut off; that he picked her up and she then made certain statements to him as to the cause of the injury she had received. These declarations of the deceased were objected to at the trial as incompetent and the ruling of the trial court in admitting them was assigned as error in this court. The court decided the evidence was admissible as part of the *res gestæ*, holding that "A declaration to be a part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause."

People v. Wong Ark, 30 Pac. Rep. [Cal.], 1115, was a murder case. At the trial a police officer was permitted to testify that after the shooting he ran to the place where the deceased was lying on the porch, a distance of about 140 yards, and in a conversation with her—for possibly a half minute—the deceased then stated to the witness that the defendant was the man who had shot her. The court held that the declaration was a mere narrative of a past event made after the event was closed, and it was not admissible as part of the *res gestæ*.

Armil v. Chicago, B. & Q. R. Co. 30 N. W. Rep. [Ia.], 42, was an action by an administratrix against the railroad company to recover damages for negligently killing her husband, and the court held that the declarations of the deceased as to the cause of the injury he had sustained, which declarations he had made after he had returned home and more than thirty minutes after the accident, were not admissible as part of the *res gestæ*.

In *State v. Pomeroy*, 25 Kan., 349, one W. alleged that P. assaulted him, while alone in his house, with a musket with intent to kill and rob him. On the trial of P. a witness testified that within five minutes after the assault W.

stated to him that P. had assaulted him, W., with a musket and demanded his money. It was held that this declaration of W.'s was inadmissible, being no part of the *res gestæ*.

In *Estell v. State*, 17 Atl. Rep. [N. J.], 118, it was held: "In a case of homicide the narration of the transaction given by the injured man, a few minutes after the affair, and after the defendant had left, is not admissible in evidence as a part of the *res gestæ*."

In *Crow v. State*, 21 S. W. Rep. [Tex.], 543, it was held: "On a trial for murder the exclusion was proper of defendant's statement of the difficulty to his mother, made half an hour after the homicide, and after driving home from the place of killing, such statement not constituting a part of the *res gestæ*."

In *King v. State*, 5 So. Rep. [Miss.], 97, it was said: "It was not error for the court not to allow appellant to prove the declaration made by him after he was arrested, and but a little more than a minute after the shooting, as to the reason why he shot the deceased. Such declaration was not a part of anything then being done, but a mere statement in regard to a past transaction, and was therefore incompetent."

These are by no means all the cases, nor any very considerable part of the cases, in which has been considered the question whether a declaration offered or given in evidence was made at such time and under such circumstances as to be part of the *res gestæ*; but they serve to illustrate the futility of any attempt to lay down a rule on the subject which will be a safe guide in all cases. Whether the declarations of a person, since deceased, are competent evidence, as being part of the *res gestæ* of some transaction occurring in the life of said deceased, in any case, must therefore be determined from the peculiar facts and circumstances surrounding the case on trial and the basis of which case is the past transaction.

Adhering to the rule quoted above from Wharton, and the rule announced in *Missouri P. R. Co. v. Baier, supra*, we proceed to inquire whether the declaration offered in evidence in the case at bar is so closely and clearly connected with the shooting of McPherson that such declaration can in the ordinary course of human affairs be said to be a spontaneous explanation of such shooting. It is to be remembered that McPherson was first discovered wounded in a railroad yard and was unconscious; but it must also be borne in mind that he regained his consciousness before being removed from the yard into the hotel. The record shows that during the time he was in the yard he made no statements as to how or by whom he was shot, nor does the record disclose that those who found him and were with him after he had regained consciousness in the yard made any inquiry of him as to how he came to be shot; and it is a significant fact, not to be lost sight of in this connection, that the prisoner in his trial neither proved, nor attempted to prove, that the deceased, while in the railroad yard and after he had recovered his consciousness, was unable to speak. He was removed from the yard to one hotel where he remained a short space of time, and thence to another where he was put to bed. The record does not inform us whether the deceased became unconscious after he was removed from the railroad yard and we must, therefore, presume that he retained his consciousness from the time he regained it up to the time he made the declaration which is offered in evidence, a period of some two hours and a half; nor does the record show that the deceased, at any time after he was removed from the railroad yard to the time that he made the declaration, ever was unable to speak. Nothing is more natural or more probable than that the parties who first found McPherson, on his regaining consciousness and being able to speak, would have inquired of him as to how he came to be shot; and it is entirely reasonable and probable that McPherson, after he

regained his consciousness in the yard, if he was able to speak, even without an inquiry, would have told those about him how he came to be shot. We are therefore constrained to hold that the declaration offered in evidence was not made under such circumstances and so soon after the shooting, the facts and circumstances all considered, as to exclude the presumption that the declaration was the result of premeditation; or, to paraphrase the language of RYAN, C., in *Missouri P. R. Co. v. Baier*, *supra*, we cannot say that the declaration and the shooting were so clearly and closely connected that the latter, in the ordinary course of human affairs, must be regarded as a spontaneous explanation of the former. In other words, we cannot indulge the presumption that the declaration was the unpremeditated explanation of the shooting. (*Hewitt v. Eisenbart*, 36 Neb., 794, and cases cited.) The assignment is therefore overruled.

4. The next assignment of error is that the court erred in giving instruction No. 11, which is in the following language: "By the term 'reasonable doubt,' as herein used, is not meant a mere caprice, conjecture, or groundless possibility. It is an actual, substantial doubt based on a reason arising either from the evidence or want of evidence in the case, and sufficient to cause an ordinary prudent man to hesitate and refuse to act in the most important affairs and concerns of life. The guilt of an accused person is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have an abiding conviction to a moral certainty of the truth of the charge; but mathematical certainty is not required." The criticism on this instruction is that the expression "but mathematical certainty is not required," was "calculated to impress the jury with the idea that anything short of mathematical certainty may properly be reasonable doubt." We think the instruction complained of would

have been better had the phrase quoted above been omitted therefrom, but we are unable to see that the jury was at all misled thereby, in view of the fact that in other instructions the degree of proof necessary to a conviction was specially and carefully commented on. The assignment is therefore overruled.

5. The fifth assignment of error is that the court erred in giving the twelfth instruction, which is in the following language: "The defendant contends that there is no evidence of any motive for the shooting of said deceased by said defendant; that they had never had any quarrel or ill-will one toward the other. But you are instructed that the question as to whether there was a motive for the defendant taking the life of the deceased, if he did take it, if that fact has been proven beyond reasonable doubt, is a question for you to determine under all the evidence in the case. If it has been proven beyond a reasonable doubt that defendant was accused of taking the life of said Louis McPherson, or of inflicting the wound that caused his death, if you find that fact has been proven beyond reasonable doubt, and that defendant stated that there had been too much stealing around there and he proposed to stop it, and any other facts that you find have been established beyond a reasonable doubt bearing upon that question, it would be for you to determine from all the evidence in the case whether the defendant had a motive for taking the life of said deceased, if he did take it, and whether that fact has been proved beyond a reasonable doubt, and you are further instructed that you should receive all evidence of verbal admissions of defendant with caution and closely scrutinize the same, as the repetition of verbal admissions or statements is more or less subject to imperfection and mistake; but if you find the defendant made an admission beyond a reasonable doubt under the evidence, and that such admission was deliberately made and precisely identified, the evidence it affords is to be considered by you the same as any other evidence

Johnson v. Parrotte.

in the case, and you should give it such weight as you in your judgments think it fairly entitled to." The criticism on this instruction is thus stated by the prisoner's able counsel in his argument: "It most emphatically directs the jury to conversations had with Collins, and states that they supplied a motive, if otherwise evidence of motive was lacking." We think this criticism without merit.

6. Finally, it is insisted that the verdict is not sustained by sufficient evidence. We think it is. The testimony of the witness Dale was, that he and McPherson were engaged in stealing coal from some cars in a railroad yard on the night that McPherson was shot; that the prisoner came up near them, pointed a pistol in the face or at the head of McPherson and fired; that McPherson fell to the ground and he, Dale, ran away. Dale also identified the prisoner as the man who shot McPherson. He further stated that he had seen him prior to the shooting, had been in his company, was somewhat acquainted with him, and he recognized him after the shooting and pointed him out to the sheriff. It is on this evidence that the verdict assailed is predicated. Dale's credibility as a witness was for the jury, and if his story was true, the verdict does not lack evidence to support it. The judgment of the district court is

AFFIRMED.

JOHN JOHNSON, APPELLEE, V. MARCUS L. PARROTTE
ET AL., APPELLANTS.

FILED OCTOBER 1, 1895. No. 7439.

1. **Supreme Court: JURISDICTION.** The supreme court is one of limited jurisdiction, both original and appellate. Its original jurisdiction is prescribed and limited by the constitution, and its appellate jurisdiction is prescribed and limited by statute.

Johnson v. Parrotte.

2. **Final Order: SETTING ASIDE VERDICT: REVIEW.** An order of the district court setting aside the verdict of a jury and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and therefore not reviewable by a proceeding in error. (*Artman v. West Point Mfg. Co.*, 16 Neb., 572.)
3. **Creditors' Bill: VALIDITY OF JUDGMENT: PLEADING.** The foundation of every creditors' bill is an unimpeachable judgment, and the plaintiff who exhibits such bill as a condition precedent to his right to relief is required to plead and prove his ownership of a valid and unsatisfied judgment.
4. **Judgments: COLLATERAL ATTACK: APPEAL: SUPREME COURT: ESTOPPEL.** Johnson sued Parrotte for damages in a district court. The jury returned a verdict in favor of Johnson, and Parrotte filed a motion for a new trial. Pending the ruling of the district court on this motion the parties entered into a stipulation, as follows: "That if the court shall grant a new trial herein, that the said plaintiff may review said order granting a new trial by petition in error to the supreme court; and that if said supreme court shall confirm said order granting a new trial, that judgment absolute shall be rendered against the plaintiff, dismissing said action with costs; but, if said supreme court reverse said order, then judgment absolute shall be rendered against the defendant for amount of verdict and costs herein." The district court sustained Parrotte's motion for a new trial. Johnson then prosecuted a petition in error to the supreme court, which reversed the order of the district court and, in pursuance of said stipulation, rendered a personal judgment in favor of Johnson and against Parrotte for the amount found by the jury. This judgment Johnson subsequently made the basis of a creditors' bill in the district court and obtained a decree canceling, as fraudulent, the conveyance of certain real estate made by Parrotte and subjecting such real estate to the payment of said judgment. On appeal of Parrotte from this decree, *held*, (1) that it was not enough that this court rendered the judgment after reversing the order made by the district court; that such order of the district court must have been a final order to invest this court with jurisdiction to review it; (2) that the order of the district court sustaining Parrotte's motion for a new trial was not a final order within the meaning of section 581, Code of Civil Procedure; (3) that the supreme court had no original jurisdiction and acquired no appellate jurisdiction of the suit of Johnson v. Parrotte, and therefore its judgment was void; (4) that Parrotte, neither by reason of having been

Johnson v. Parrotte.

a party to the stipulation aforesaid, nor by reason of having had in the district court and in the supreme court a suit in equity for a new trial of the original action had estopped himself from assailing this judgment as void; (5) that a void judgment is in reality no judgment at all. It is a mere nullity. It is supported by no presumptions and may be impeached in any action direct or collateral. (1 Black, Judgments, sec. 170.)

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

F. G. Hamer, for appellants.

Dryden & Main, contra.

RAGAN, C.

The facts necessary to an understanding of this case are briefly as follows: Some years ago, in the district court of Buffalo county, John Johnson sued Marcus L. Parrotte at law for damages for the latter's alleged misrepresentation of some sheep sold by him to Johnson, who had a verdict, and Parrotte filed a motion for a new trial. Pending the ruling of the district court upon Parrotte's motion for a new trial the parties entered into a stipulation as follows: "That if the court [district court] shall grant a new trial herein, that the said plaintiff may review said order granting a new trial by petition in error to the supreme court; and that if said supreme court shall confirm said order granting a new trial, that judgment absolute shall be rendered against the plaintiff dismissing said action with costs; but if said supreme court reverse said order, then judgment absolute shall be rendered against the defendant for amount of verdict and costs herein." This stipulation was incorporated in the record of the case on trial in the district court and that court thereupon sustained Parrotte's motion for a new trial, but rendered no judgment dismissing Johnson's action. Johnson then prosecuted a petition in

error to the supreme court to reverse the order of the district court granting Parrotte a new trial, and the supreme court reversed that order and, in pursuance of the stipulation above, rendered a money judgment in favor of Johnson and against Parrotte for \$981.50. (See *Johnson v. Parrotte*, 23 Neb., 232.) The judgment of this court in the case was by mandate certified to the district court of Buffalo county. Subsequently, Johnson caused an execution to be issued out of the office of the clerk of the district court of Buffalo county. This execution was based on the mandate sent down by this court in the case above mentioned, and levied upon certain real estate alleged to have been the property of Parrotte at the time of the rendition of the judgment in the case by the supreme court. The execution not having been returned satisfied, Johnson brought this suit in equity, a creditors' bill, against Parrotte and others in the district court of Buffalo county to have declared fraudulent and void and have set aside certain conveyances made of certain real estate by Parrotte subsequent to the date of the rendition of the verdict above mentioned in the district court of Buffalo county in the law action of Johnson against Parrotte. Johnson had a decree as prayed for in his petition in equity, and Parrotte has brought the same here for review. It will thus be seen that the creditors' bill of Johnson and the decree of the district court under review have for their foundation the judgment of this court pronounced in *Johnson v. Parrotte* in pursuance of the stipulation quoted above. Did the supreme court have any jurisdiction to render that judgment?

Section 2, article 6, of the constitution provides: "It [supreme court] shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law."

Section 582 of the Code of Civil Procedure provides: "A judgment rendered or final order made by the district

court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record."

Section 581 of the Code of Civil Procedure provides: "An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title."

Section 594 of the Code of Civil Procedure provides: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

It will be seen that the supreme court is one of limited jurisdiction, both original and appellate. Its original jurisdiction is prescribed and limited by the constitution and its appellate jurisdiction prescribed and limited by statute. It is scarcely necessary to remark that the original damage suit of Johnson v. Parrotte brought to the district court of Buffalo county was not a case which related to the revenue, nor a civil case to which the state was a party, nor a *mandamus*, *quo warranto*, or *habeas corpus* proceeding, and that, therefore, the supreme court would have been and was without any original jurisdiction whatever to hear and determine that case; and had Johnson brought his damage suit against Parrotte to the supreme court in the first instance, that tribunal would have had no jurisdiction over the subject-matter of the action, and any judgment pronounced therein would have been a nullity.

Did the supreme court acquire jurisdiction of the case by the error proceeding prosecuted by Johnson from the order of the district court sustaining Parrotte's motion for a new trial? The answer to this question depends upon whether the order of the district court granting Parrotte's

Johnson v. Parrotte.

new trial was a final order within the meaning of sections 581, 582, and 594 of the Code of Civil Procedure above quoted. These sections have been repeatedly construed by this court, and it has been uniformly held that an order, to be final, must dispose of the whole merits of the case on trial and leave nothing for the further determination of the lower court. (*Smith v. Sahler*, 1 Neb., 310.) In *Brown v. Edgerton*, 14 Neb., 453, it was held: "An order of a district court vacating its own judgment during the term at which it was rendered is not a final order, and therefore is not reviewable by proceedings in error." In *Artman v. West Point Mfg. Co.*, 16 Neb., 572, it was held: "An order of the district court setting aside the verdict of a jury and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and therefore not reviewable by proceedings in error." (See, also, *Gapen v. Bretternitz*, 31 Neb., 302.) And finally, in the very case in which the supreme court assumed to render the judgment made the basis of the case under review, the court said: "The decision of the district court in sustaining a motion for a new trial after the cause has been tried to a jury and verdict returned is not a subject for review until after a final judgment is rendered in a cause." (*Johnson v. Parrotte*, 23 Neb., 232.) We conclude, therefore, that the supreme court was without appellate jurisdiction to render the judgment made the basis of the present action, and that its judgment was not voidable, but absolutely void. It is not enough that the judgment rendered by this court was rendered by it after reversing the order under review made by the district court. Such order must have been a final order to invest this court with jurisdiction to review it; and since the order of the district court granting Parrotte a new trial was not a final order within the meaning of the statute, we conclude that the supreme court never acquired even appellate jurisdiction of that case and that the judgment pronounced by it therein was and is a nullity.

It is insisted by the appellee that the judgment is not open to collateral attack; that the appellant, by reason of being a party to the stipulation aforesaid, or by reason of certain equity proceedings brought in and had by him in the district court of Buffalo county and in this court for a new trial of the original action after the supreme court had rendered the judgment, is now estopped from assailing the judgment on which this action is based as being void. "Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." (1 Black, Judgments, sec. 170.) But for Parrotte to assert that this judgment is void is not to attack it collaterally, as the basis of every creditors' bill is an unimpeachable judgment; and Johnson in this case, as a condition precedent to his right to the relief for which he prayed in his petition, was required to plead and prove his ownership of a valid and unsatisfied judgment. He has done neither. The petition itself does not state a cause of action. It alleges the bringing of the damage suit of Johnson v. Parrotte in the district court of Buffalo county, the return of a verdict in that action in favor of Johnson,

Wood v. State.

the stipulation of the parties, the sustaining by the district court of Parrotte's motion for a new trial, the prosecution by Johnson of proceedings in error to this court to reverse the district court's ruling, and the rendition by this court of the judgment which he owns and is unsatisfied, and which, he alleges, should be paid by a sale of certain real estate fraudulently conveyed by Parrotte. But the petition does not allege that the district court, in the damage suit, rendered a judgment dismissing Johnson's action. The lack of jurisdiction in this court to render the judgment appears then on the face of the petition. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SAMUEL WOOD v. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7699.

1. **Rape: EVIDENCE.** While in a prosecution for rape, or an assault with intent to commit rape, the state may only inquire of the prosecutrix whether she made complaint of the injury, and when and to whom, but not as to the particular facts which she stated, still the defense, in cross-examination, may inquire as to such particular facts.
2. ———: ———: **REVIEW: UNFOUNDED ASSIGNMENTS OF ERROR.** In a prosecution for an assault upon a girl under the statutory age of consent, with intent to commit a rape, whether the girl consented or resisted is immaterial, and to constitute the offense it is, therefore, unnecessary to prove that the defendant intended to use force if necessary, to overcome her resistance.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

Alex. Altschuler and *J. C. McNerny*, for plaintiff in error.

A. S. Churchill, Attorney General, and *W. S. Summers*, Deputy Attorney General, for the state.

IRVINE, C.

The plaintiff in error was convicted in the district court of Lancaster county on an information charging him with making an assault upon one Louisa Schrader, a female child nine years of age, with intent to commit a rape upon her person. The prosecutrix had testified that immediately after the alleged assault she had made complaint thereof to her mother. On cross-examination she was asked, "What did you tell your mother when you went out there?" This question was objected to, as incompetent and immaterial, and the objection was sustained. An offer was then made by the defendant to prove that prosecutrix had made statements to her mother differing from the testimony she had given upon the stand, and the objection being repeated, was again sustained. In excluding this evidence on cross-examination we think the learned district judge erred. Whether in the examination in chief the particulars of the complaint may be elicited, or whether the state is restricted to a general inquiry as to the fact that a complaint was made, is a question upon which the authorities are not harmonious. In *Regina v. Walker*, 2 Moody & R. [Eng.], 212, Baron Parke said: "The sense of the thing certainly is, that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire, generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter [evidently meaning the prisoner's] to bring before the jury the particulars of that complaint by cross-examination." This view has been taken by some courts whose decisions are entitled to the highest respect, and among authors it has received the approval of the late Justice Stephen. These authorities place the admissibility of such testimony

on the ground that it constitutes a part of the *res gestæ*. The prevailing doctrine, however, is that stated by Professor Greenleaf (3 Greenleaf, Evidence, sec. 213), as follows: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no. Indeed, the complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant; and, where she is not a witness in the case, it is wholly inadmissible." This is the view which has been taken in this state. (*Oleson v. State*, 11 Neb., 276.) But it will be observed that Professor Greenleaf, in stating the more restricted doctrine, unmistakably implies that the particulars of the complaint may be brought out on cross-examination, and this seems to be the view taken wherever the restricted doctrine prevails, although in the reported cases the rule in regard to cross-examination is for the most part stated under circumstances which render it, strictly speaking, *obiter*. (*Scott v. State*, 48 Ala., 420; *Barnett v. State*, 83 Ala., 40; *State v. Richards*, 33 Ia., 420; *State v. Jones*, 61 Mo., 232; *Regina v. Walker*, *supra*; *State v. Langford*, 45 La. Ann., 1177.) In the absence of direct authority, and even if the general rule were not always stated with a qualification as to cross-examination, we think that the admission of the particulars of the complaint on cross-examination is in harmony with the general principles of evidence.

The plaintiff in error requested the following instruction, which was refused: "You are further instructed that you

must further find from the evidence beyond a reasonable doubt, before you can convict the defendant, that the defendant must have intended to use whatever force was necessary to overcome her resistance and compel her to submit to his passions, to make out the crime of an assault with intent to commit rape." The refusal of this instruction is assigned as error, and *Skinner v. State*, 28 Neb., 814, is cited in support of the assignment; but *Skinner v. State* was the case of a charge of rape upon a woman of mature years, where the element of force would have been an essential ingredient of the consummated offense. By our statute (before the amendment of 1895), the carnal knowledge, with her consent, of any female child under the age of fifteen years constituted a rape when the offender was of the age of eighteen or upwards, and an assault by such a person upon a female child under fifteen, with an intent to carnally know her, was an assault with intent to commit a rape, regardless of her consent. (*Davis v. State*, 31 Neb., 247; *Head v. State*, 43 Neb., 30.) Under the charge contained in this information, it was, therefore, unnecessary to establish an intent to use force if necessary to overcome the will of the child, and the instruction was properly refused.

The other assignments of error relate to matters which may be deemed accidental to the former trial, and not inherent in the case itself, and will not, therefore, be considered, except in one respect. It is assigned that the verdict is not sustained by the evidence, and in support of this assignment it is, among other things, suggested that the state failed to prove the venue. The evidence shows, without contradiction, that the offense, if any were committed, occurred in the home of the prosecutrix's parents. The mother of the prosecutrix was asked: "Mrs. Schrader, where do you live?" A. "Eleven miles east; ten miles east and one mile north." Q. "Is your place in Lancaster county, Nebraska?" A. "Yes, sir." The first question

Van Horn v. State.

asked the father was as follows: "Mr. Schrader, where do you live?" To which he answered: "Lancaster county, Nebraska." There is no contrary evidence, and the venue was, therefore, fully proved. We refer to this assignment merely for the purpose of saying that it is one which should not be made. Unfounded assignments of this character presumably cost counsel some effort. They certainly occupy the time of the court, and they avail nothing.

REVERSED AND REMANDED.

S. S. VAN HORN ET AL. V. STATE OF NEBRASKA, EX
REL. JOHN W. C. ABBOTT.

FILED OCTOBER 1, 1895. No. 7998.

1. **Townships: COUNTY BOARDS.** The distinguishing feature of township organization lies in the application of the principle of local self-government. It is the regulation of purely local affairs by the townships and local officers thereof, and not the constitution of the county board, which distinguishes the township system.
2. ———: **SUPERVISORS.** Where supervisors are local officers, their number and the manner of their election are subjects connected with township organization, and not solely related to county government.
3. **Statutes: SUBJECT OF BILL: TITLE OF ACT: CONSTITUTIONAL LAW.** The object of section 11, article 3, of the constitution, providing that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the constitution.
4. ———: ———: ———: ———. Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. Apparent duplicity in the title alone does not invalidate the act.

5. **Township Organization: VALIDITY OF STATUTE.** Chapter 28, Session Laws, 1895, providing for township organization, etc., has but one subject, which is clearly expressed in its title.
6. ———: ———. Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded. (*Albertson v. State*, 9 Neb., 429.) Session Laws, 1895, chapter 28, construed, and held to provide for seven supervisors in all counties under township organization.
7. **Statutes: AMENDMENT OF LAWS: REPEAL: CONSTITUTIONAL LAW.** That portion of section 11, article 3, of the constitution, providing that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed," has no application to acts complete in themselves, and not in their effect simply amendatory. Such complete acts are valid, although they may modify or destroy the effect of previous legislation.
8. **Township Organization: CONSTITUTIONAL LAW.** Section 5 of article 10 of the constitution confers upon the people by vote the power of adopting and discontinuing township organization, but it leaves to the legislature the power of providing the details of such organization.
9. ———: **AMENDMENT OF LAW.** The legislature may, therefore, amend or change the law in regard to township organization, without referring such change to a vote of the people.
10. **County and Township Officers.** Section 4, article 10, of the constitution, enacting that the legislature shall provide by law for the election of such county and township officers as may be necessary, does not prevent the legislature when it reduces the number of officers from providing that those already elected shall cast lots to determine whose terms of office shall be discontinued; nor does it prevent the legislature from providing for the filling of vacancies provisionally by appointment.
11. **Statutes: UNIFORMITY OF OPERATION.** If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. (*State v. Berka*, 20 Neb., 375.)
12. **Mandamus: MINISTERIAL OFFICERS: CONSTITUTIONAL LAW.** Ministerial officers, upon whom the legislature has sought to impose a duty by statute, may assert the unconstitutionality of that statute as a defense to an application for a *mandamus* to require them to perform the supposed duty.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J.

The case is stated by the commissioner.

Samuel Maxwell and C. Hollenbeck, for plaintiffs in error:

The act under consideration is void because the title contains more than one subject. (Sutherland, Statutory Construction, secs. 86-97; *State v. Lancaster County*, 6 Neb., 474; *Trumble v. Trumble*, 37 Neb., 340; *Curch v. City of Detroit*, 31 N. W. Rep. [Mich.], 447; *Davies v. Board of Supervisors*, 50 N. W. Rep. [Mich.], 862; *Ives v. Norris*, 13 Neb., 252; *Holmburg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Weigel v. City of Hastings*, 29 Neb., 379; *Northwestern Mfg. Co. v. Chambers*, 58 Mich., 381; *People v. Congdon*, 43 N. W. Rep. [Mich.], 386.)

The act is void, for the reason that it contains several subjects independent of each other which are not embraced within the title.

The constitutionality of the act is challenged upon the ground that it is ambiguous and indefinite to such an extent that it is incapable of enforcement.

The legislation is special, because the act provides five supervisors for some counties and seven for others.

The law repeals a large number of other laws without any reference to them in the title of the act and is therefore invalid.

The act is inoperative and void as to counties now under township organization, because it imposes upon such counties the system of local government provided for by the act without a vote of the people of the county, as provided in section 5, article 10, of the constitution.

The act under consideration practically, and in effect, amends the act of 1879 (Compiled Statutes, 1895, sec. 62, ch. 18), without any reference to it, and should therefore be

declared invalid. (*Trumble v. Trumble*, 37 Neb., 340; *State v. Lancaster County*, 6 Neb., 474.)

The act is objectionable, because it provides for new county officers and provides for their selection by casting lots, thereby amending the laws in relation to appointment.

The board of county supervisors may resist an application for *mandamus* on the ground that the act of the legislature, requiring the performance of the duty sought to be enforced, is unconstitutional. (*State v. Lancaster County*, 6 Neb., 474.)

George L. Loomis, also for plaintiffs in error.

John W. C. Abbott and *J. E. Frick*, contra:

The law does not violate section 11, article 3, of the constitution, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." (23 Am. & Eng. Ency. Law, 232; *State v. Atlantic City*, 28 Atl. Rep. [N. J.], 427; *Van Husen v. Heames*, 56 N. W. Rep. [Mich.], 22; *Henderson v. State*, 36 N. E. Rep. [Ind.], 257; *Bissell v. Heath*, 57 N. W. Rep. [Mich.], 585; *State v. Mines*, 18 S. E. Rep. [W. Va.], 470; *People v. Taylor*, 56 N. W. Rep. [Mich.], 27; *Gaines v. Williams*, 34 N. E. Rep. [Ill.], 934; *People v. Brooks*, 59 N. W. Rep. [Mich.], 444, 816; *Board of Trustees v. Daniels*, 25 S. W. Rep. [Ky.], 746; *Lynch v. Murphy*, 24 S. W. Rep. [Mo.], 774; *Curtin v. Barton*, 34 N. E. Rep. [N. Y.], 1093; *In re Board of Commissioners of Johnson County*, 32 Pac. Rep. [Wyo.], 850; *Barnhill v. Teague*, 11 So. Rep. [Ala.], 444; *Mills v. Charleton*, 9 Am. Rep. [Wis.], 578; *Commonwealth v. Depuy*, 23 Atl. Rep. [Pa.], 896; *State v. Tucker*, 46 Ind., 355; Black, Constitutional Law, 286; *People v. Mahaney*, 13 Mich., 496; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 227; *Kansas City & O. R. Co. v. Frey*,

30 Neb., 790; *State v. Ream*, 16 Neb., 681; *State v. Page*, 12 Neb., 386; *Dogge v. State*, 17 Neb., 143; *State v. Babcock*, 23 Neb., 128; *Gatling v. Lane*, 17 Neb., 80; *Poffenbarger v. Smith*, 27 Neb., 788; *Bonorden v. Kriz*, 13 Neb., 121.)

The contention of plaintiffs in error that the act repeals the law of 1879 without reference to the government of counties is not tenable. (*Jones v. Davis*, 6 Neb., 33; *State v. Page*, 12 Neb., 386; *Brome v. Cuming County*, 31 Neb., 362; *Warren v. Crosby*, 34 Pac. Rep. [Ore.], 661; *People v. Mahaney*, 13 Mich., 496; Cooley, Constitutional Limitations [5th ed.], 181.)

The following authorities are cited in reply to the contention that the act repeals a large number of different statutes without any reference to them: *Brome v. Cuming County*, 31 Neb., 362; Sutherland, Statutory Construction, secs. 154-156.

As to uniformity of laws, reference is made to the following cases: *State v. Berka*, 20 Neb., 375; *Lancaster County v. Trimble*, 33 Neb., 121.

In reply to the contention that the act is invalid because it effects a change in township organization without submitting the question to the legal voters, under section 5, article 10, of the constitution, the following authorities are cited: *Board of Supervisors v. Heenan*, 2 Minn., 330; *Bank of the Republic v. Hamilton*, 21 Ill., 53; *People v. Brislin*, 80 Ill., 423.

The law is not invalid because it provided for the casting, or drawing, of lots to determine which one of the several supervisors should temporarily represent any given district that might be established from two or more townships until the following general election. (*State v. Douglass*, 7 Am. Rep. [Wis.], 87; *Prince v. Skillin*, 36 Am. Rep. [Me.], 325; 19 Am. & Eng. Ency. Law, 562.)

The act is not void for indefiniteness. (*In re Frey*, 18 Atl. Rep. [Pa.], 478; *Board of Supervisors v. Heenan*, 2 Minn., 339.)

The plaintiffs in error have no such rights involved as entitle them to question the validity of the act. (*People v. Salomon*, 54 Ill., 39; *Merrill*, *Mandamus*, sec. 65.)

IRVINE, C.

Chapter 28 of the Session Laws of 1895, among other radical changes with regard to counties under township organization, fixes the number of supervisors in such counties at seven, and in counties now having township organization requires the county clerk to call a special meeting of the supervisors for the purpose of dividing the county into suitable supervisor districts, and choosing supervisors for such districts. After making such division the supervisors are required, if there be more than one supervisor in any district so formed, to cast lots among themselves and so select one to remain supervisor for such district; and if there are any vacancies, the board appoints supervisors to fill them. The county clerk of Dodge county called a meeting of the board in pursuance of the act, and the board when assembled refused to perform the duties imposed upon it, on the ground that the act was in violation of the constitution and void. The board at the same time instructed the county attorney to take the proper steps to have the constitutionality of the act determined, and the county attorney therefore applied to the district court for a writ of *mandamus* to compel the board of supervisors to meet and divide the county into seven supervisor districts, as required by the act in question. The supervisors demurred to the petition for the writ. The district court overruled the demurrer and allowed the writ. From this judgment the respondents prosecute error.

The record presents only one general question—the constitutionality of the act of 1895. In order to an understanding of the case, a brief review of the legislation on the subject is necessary. Section 5 of article 10 of the constitution requires that “The legislature shall provide

by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law." Attempting to perform the duty imposed upon the legislature by this provision, there was passed in 1877 "An act to provide for township organization." This act, outside of its professed object, contained many provisions in regard to county government in general, and in regard to taxation and revenue, and was declared unconstitutional in *State v. Lancaster County*, 6 Neb., 474, for the reason that the act embraced subjects not indicated by the title, and that its various provisions were so interdependent that the portion indicated by the title could not be given separate effect. In 1879 there was passed "An act concerning counties and county officers." This act presented a complete scheme of county government, and contained special provisions for the government, not of townships, but of counties under township organization, although there was at that time, by reason of the failure of the act of 1877, no means of accomplishing township organization. The validity of the act of 1879 was presented to the court in the case of *State v. Page*, 12 Neb., 386, and the court held that the act embraced but one general object which was fairly expressed by the title, and that the act was, therefore, not in conflict with that portion of section 11, article 3, of the constitution, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." So the law rested until 1883, providing for county government in counties under township organization, but being ineffective as to that portion of the law for want of a law authorizing and providing for township organization. By chapter 36, Session Laws,

1883, a scheme of township organization and government was finally enacted under the title of "An act to provide for township organization, to divide counties under township organization into supervisor districts, to define the rights, powers, and liabilities of towns, the duties, and compensation of the officers thereof." This act, with some amendments, has remained in force until the present year. The act here in question (Session Laws, 1895, ch. 28) has for its manifest object to supersede the act of 1883, by providing a new and complete plan of township organization and government, and by expressly repealing the act of 1883. Further statements in regard to the nature of these various acts can more conveniently be made in connection with the several arguments advanced.

It is urged that the title to the act of 1895 is double; that it contains more than one subject; that the bill relates to both township and county government, two entirely separate and distinct subjects, and that both the title and the act indicate this duplicity. The title of the act is as follows: "An act to provide for township organization, to divide counties under township organization into supervisor districts, to define the rights, powers, and liabilities of towns, the duties and compensation of the officers thereof, and to provide for the election of town officers, and for the election of supervisors, and the term of office of supervisors to be elected and chosen in the several supervisor districts into which the county is to be divided when governed by township organization, and to repeal sections one (1) to sixty-two (62), both inclusive, of article four (4), chapter eighteen (18), Compiled Statutes of Nebraska, 1893." An analysis of the act discloses that it embraces the whole subject of township organization and government, but that it does not affect in any manner the government of the county as such, except by changing the law in regard to the constitution of the board of supervisors. County government and the duties of the board of

supervisors in county affairs remain as they were provided by the act of 1879. In connection with and incidental to the main provisions of the act we do, however, find certain provisions which it may be said affect the county as a whole. Under the law of 1883 each township selected a supervisor, with certain provisions relating specially to cities. Under the present law, laying out of view for the moment a complication to be hereafter noticed, the county is to be divided into seven supervisor districts, each one choosing a supervisor. In addition to this the act contains a special provision (sec. 65) with regard to the duties of supervisors. This section relates not to their duties as members of the county board, but to their duties as local officers, giving to each special charge of the expenditure of money appropriated for roads, bridges, and culverts within his supervisor district, and requiring each supervisor to account to the board for all money so received and disbursed. It may, by the way, be here remarked that by virtue of this provision the supervisors remain local officers charged with local duties, and that, therefore, the contention of the respondents that this act deprives them of all such powers and duties, and makes them merely county commissioners, is unfounded. The act also provides for the method of accomplishing a change from the commissioner system to township organization, and also contains provisions, being those directly brought into controversy in this action, for the purpose of conforming counties already working under township organization to the provisions of the new law. In considering the act it is necessary to have constantly in mind what is really meant by township organization. We have in this state two systems of government within the county. By one of these systems, designated for convenience "the commissioner system," the government of the county at large and of its subdivisions is entrusted to a board of county commissioners, who, together with certain governmental agents subordinate

to them, conduct all the affairs of the county, local and general. Under the other system, called "the township system," the county is subdivided into townships, or towns. Each of these towns constitutes a body corporate. The purely local affairs are entrusted to the town meetings of the several towns, or to township officers selected by the towns, while the general affairs of the county are conducted by a board constituted of the various township supervisors. The essential feature of township government lies in the application of the principle of local self-government. It is not the constitution of the county board, but the local government of the townships which marks the distinction between the two forms of government. The constitution of the supervisors into a county board is accidental to the system, but by no means essential thereto. Township government, within the meaning of the constitution, might well be provided for as in the act of 1883, or in the act of 1895, but without the supervisors or other township officers having any functions in the government of the county at large. Indeed, the writer recalls that in the state of Pennsylvania just such a system of township government prevails, the townships having their local officers, but the county being governed at large by a board of commissioners, constituted very much as the boards existing in our counties in which the commissioner system prevails. Bearing in mind this distinction, we think it will be apparent at once that the act of 1895 has but one main and general subject, to-wit, the organization of townships and the government thereof. The other provisions of the act have direct reference to this main subject, are cognate therewith and incidental thereto. The government of the county at large is not affected. The board of supervisors has the same powers and the same duties as the county board had before the passage of the act. Only the number of supervisors and the manner of their election are changed. As we have said, the organization of the super-

Van Horn v. State.

visors into a county board is purely fortuitous, for convenience merely. These local officers constitute the county board, but they are still local officers, and their number and the manner of their election are properly connected with the subject of the local government. For the purposes of this discussion it may be assumed that the title of the act may state several subjects; but this is not the question. The constitutional inhibition is against the bill's containing more than one subject. The title must clearly express the subject, but provided the bill itself contains but one subject, and this subject is clearly expressed in the title, it matters not although the title, read independently of the bill, may seem double. We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here discussing is not violated. Tested by this rule, we have no hesitation in saying that the subject-matter of this act is single, and that while a more comprehensive and shorter title might have been sufficient to indicate the contents of the bill, still the title which the legislature adopted does clearly indicate every essential feature of the act.

In view of the numerous cases in which this court has been called upon to apply the constitutional provision referred to, we might dismiss this branch of the case here; but, in view of the large number of counties affected by the decision, and in view of the elaborate argument based upon authority which has been advanced on behalf of the respondents by counsel of long forensic and judicial experience, we think it proper to refer in this connection to the cases in this state which have been cited. The desirability of not unreasonably extending an opinion, which must necessarily be somewhat long, forbids our referring to the decisions of other courts, especially as almost every conceivable phase of the question has received an adjudication in this court.

In most of the cases where acts of the legislature have been declared to be in conflict with this provision of the constitution, while in some of them general language may be found suggesting duplicity of subject, it will be found that the decision was based not upon that duplicity, but upon the fact that the legislature had adopted a title which was too restrictive and did not clearly express the subject of the act. Such cases are the following: *Smails v. White*, 4 Neb., 353; *White v. City of Lincoln*, 5 Neb., 516; *State v. Lancaster County*, 6 Neb., 474; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *Ives v. Norris*, 13 Neb., 252; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Weigel v. City of Hastings*, 29 Neb., 379. In some of the foregoing cases it was, however, unmistakably intimated that the act was not bad for duplicity and would have been valid under a broader title. In *State v. Lancaster County*, 17 Neb., 85, while the syllabus refers only to the title, it is clear from the opinion that the court deemed the act itself bad for duplicity; but the act there under consideration provided for the registry, sale, leasing, and general management of school lands, and also sought to incorporate therein a repeal of an act providing for the repayment of taxes levied on lands the legal title of which was in the state. Here were two subjects clearly. The repeal of the law in relation to repaying taxes was not incidental to the main purpose of the act. It was not cognate therewith, nor did it in any manner relate thereto. It was wholly separate and distinct from the main purpose. In *Trumble v. Trumble*, 37 Neb., 340, an act of 1889 relating to various matters connected with decedents' estates was held void, among other reasons, for duplicity of subject; but that act had for its ostensible purpose the amendment of only two sections of the law in regard to decedents, and, therefore, the professed subject of the act extended only to such matters as were germane to those two sections. Every subject not so germane was, therefore, a separate

subject. We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation the subject is single so long as the act has but a single main purpose and object. Thus, we would have no doubt of the power of the legislature by a single act to provide a new and complete Code of Civil Procedure, but if the legislature should undertake in an act whose main purpose should be, for instance, to provide for supersedeas bonds, to also provide for the issuing of original summonses, or the effect of a demurrer, we would have no hesitation in saying that such an act contained more than one subject. The act under consideration in *Trumble v. Trumble* was of the latter character, and if this idea was not clearly expressed in the opinion, the writer, who was also the author of that opinion, owes an apology to the profession, and can only say that the general language there used should be read as applied to the questions presented in that case. In none of the cases already cited, and in none decided by this court, has it ever been held that the constitution required any subdivision of legislation into distinct acts, each having reference to only so much as might practicably form a single act. On the contrary, it has always been said that the legislature might choose for itself its manner of legislation, and that an act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose. Thus, in *State v. Page*, 12 Neb., 386, the act of 1879, already referred to, entitled "An act concerning counties and county officers," was held to contain but one subject because it had "but one general object," fairly expressed in the title, although this act contained a complete scheme of county government, and so operated as to materially change the law on other subjects related thereto. In *Bonorden v. Kriz*, 13 Neb., 121, the

court considered an act entitled "An act to exempt homesteads from judicial sale," and held that a provision in that act that a conveyance or incumbrance by the owner would be of no validity unless the husband and wife concurred in and signed the same joint instrument was valid and within the general subject of the act. It might be remarked that this act, in connection with its main features, provided for the change of homesteads and for their descent. The court evidently regarded these features within the same general purpose as the exemption of homesteads from judicial sale. In *White v. City of Lincoln*, 5 Neb., 505, it was said by MAXWELL, J.: "The object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions, which have no connection with the general object of the bill and of which the title gives no indication. It will be sufficient, however, if the law have but one general object which is fairly expressed in the title of the bill." In *Poffenbarger v. Smith*, 27 Neb., 788, it was held that those provisions of what is known as the "Slocumb Law," subjecting a liquor seller to liability for damages sustained in consequence of the sale of intoxicating liquors, were "in harmony with the object of the act," and valid. In *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790, there was involved the question of the constitutionality of an act giving laborers and material-men a lien upon a railway for material furnished and labor performed thereon. It was held that the various provisions of that act constituted a single subject of legislation, MAXWELL, J., saying, "The object of the framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it. In other words, members were pro-

hibited from joining two or more bills together in order that the friends of the several bills may combine and pass them. It was never designed to place the legislature in a strait-jacket and prevent it from passing laws having but one object under an appropriate title." In *Hopkins v. Scott*, 38 Neb., 661, it was held that chapter 50, Session Laws, 1891, providing for the deposit in banks of state and county funds, had but one subject, although relating to both state and county moneys, the general subject being the custody of public funds. We think these cases plainly indicate the test we have endeavored to express and that by that test this act is not bad for duplicity and the title expresses its subject.

2. It is urged in the second place that the act creates a new office of county supervisors, and defines the powers and duties of county boards, and that these subjects are not expressed in the title. These questions have been incidentally disposed of in considering the first objection.

3. Next, it is argued that the act is indefinite and incapable of execution, because, first, it provides for only five supervisors in counties having one city of over 1,000 inhabitants, and this provision is in conflict with other parts of the act, and, second, that there is no provision for counties having more than one city of over 1,000 inhabitants. Section 4 of the act is as follows: "On the second Tuesday after such election adopting township organization in any county the county commissioners of the county shall meet at the county seat of such county and shall forthwith, and within not more than three days from and after the first day of meeting, divide such county into seven districts to be known as supervisors districts; such districts to be divided as near as possible with regular boundary lines and in regular and compact form and shape, and each district shall as near as possible have the same number of inhabitants as any other district; but no township shall be divided by any such district; *Provided*, That in counties having

cities over one thousand inhabitants, and more inhabitants than the average outlying districts, the county commissioners shall add enough contiguous territory to such city so that the inhabitants in such city and contiguous territory shall equal the inhabitants of two of the other districts, and when so divided such district in which such city is located shall elect two supervisors to be elected at large within such district; *Provided further*, That if a county is divided with such a city district, then and in such event the balance of the territory shall only be divided into three districts, and such city district shall receive number as hereinafter provided; *Provided further*, That if any such city has more than the requisite inhabitants for two districts, then and in such event sufficient outlying territory may be added to such city to make three districts. The supervisors in such city districts shall be elected at large, and the balance of that territory outside of such city districts shall be divided so as to create seven districts including such city districts." (Compiled Statutes, 1895, sec. 4, art. 4, ch. 18.) There is certainly a conflict between the proviso of this section requiring in counties with city districts that the remainder of the territory shall be divided into three districts, and other portions of the act. It is suggested in argument that this state of affairs arose from the fact that the bill as originally drawn provided in all cases for only five supervisors; that during its progress in the legislature it was amended so as to provide for seven, but in this one case the proper amendment was not inserted. However this may be, we could not amend the act so as to make it conform with the unexpressed intent of the legislators. But in *Albertson v. State*, 9 Neb., 429, and *Ryan v. State*, 5 Neb., 276, it was held that where there is an irreconcilable conflict between different sections, or parts of the same statute, the last words stand, and those in conflict therewith are repealed. By the last sentence of section 4 it is provided that supervisors in such city districts

"shall be elected at large and the balance of that territory outside of such city districts shall be divided so as to create seven districts including such city districts." By section 5 it is made clear that where a city is entitled to more than one supervisor, it shall for the purpose of subdivision be deemed two districts, because that section provides: "When the county has been divided as in the preceding section provided, the county commissioners shall at once, upon such division, proceed to number such districts from one to seven, and they shall in case of a city district as contemplated in the preceding section, give such city district two or more numbers, one odd and one even number." Section 7 provides that county commissioners of a county having adopted township organization shall be assigned to the supervisor district in which each resides, "and the three shall forthwith appoint four supervisors to fill the vacancies in the other four supervisors districts." Section 8 provides that after the supervisors qualify "they shall at once organize by electing one of the seven supervisors as chairman." It is plain from these later provisions that the legislature contemplated that there should be in all cases seven supervisors, and these provisions being therefore in conflict with that provision of an earlier section, seeming to provide for five supervisors in certain cases, the rule in *Albertson v. State* requires us to reject the earlier provision, and thus give effect to the manifest final intent of the legislature. As to the objection that no provision is made for counties having more than one city of over 1,000 inhabitants, it is sufficient to say that the general provisions of section 4 in regard to equalizing the number of inhabitants in each district, especially the qualification making the special provision in regard to city districts applicable only where such city has more inhabitants than the average outlying districts, provide adequately for the case contemplated. Thus, assuming that a county has a population of 21,000, the average number of inhabitants for supervisor districts

would be 3,000, and no city would fall within the proviso of section 4 unless it had more than 3,000 inhabitants. Suppose there were in such a county two cities, one of 4,000 and one of 5,000 inhabitants. To the city having 4,000 inhabitants would be added sufficient contiguous territory to include 2,000 additional, and there would thus be formed a double district entitled to two supervisors. To the city having 5,000 inhabitants would be added sufficient contiguous territory to add another thousand, and this, too, would form a double district. There would thus be carved out of the county two double districts, each having 6,000 inhabitants. The remainder of the county would have 9,000 inhabitants, and would be divided into three districts. Such is the unmistakable construction of section 4, and it fully meets the objections urged against it.

4. It is contended that the act lacks uniformity, and is therefore obnoxious to that provision of the constitution prohibiting special legislation in certain cases. This argument is based on the same grounds as the preceding, and what has already been said disposes of it.

5. The next contention is that the act repeals and amends a large number of statutes without any reference whatever to the statutes amended or repealed, and that it is, therefore, violative of that portion of section 11, article 3, of the constitution, providing that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." The answer to this argument is that the act is one complete in itself, covering the whole subject to which it relates, that it is competent for the legislature to pass a new act complete in itself, and the fact that such act modifies, changes, or destroys the effect of other statutes does not render it in conflict with the constitution. (*State v. Whittemore*, 12 Neb., 252; *State v. Ream*, 16 Neb., 681; *Stricklett v. State*, 31 Neb., 674; *Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409.) While the manner

in which the rule was applied in the last case cited may be open to criticism, we think the test afforded by that rule, and as stated in all the cases, is a safe and proper one. As said by Judge Cooley in *People v. Mahaney*, 13 Mich., 481, to require whenever a new statute is passed that all prior statutes modified by it by implication should be re-enacted and published at length, would require a large portion of the whole code of laws to be republished at every session, and parts of it several times over, until from the mere immensity of material it would be impossible to tell what the law is, and would also render such a statute obnoxious to other provisions of the constitution relating to the subject of laws and their titles. "An act complete in itself is not within the mischief designed to be remedied by this provision and cannot be held to be prohibited by it without violating its plain intent." It is true, as held in *Smails v. White*, *supra*, that it matters not whether the new statute assumes to be amendatory or not. It is within the inhibition if it is in effect amendatory, but this rule applies only to acts either professedly or in effect simply amendatory and to acts incomplete in themselves. To complete acts our constitution has no reference and they must prevail as against earlier legislation in conflict therewith.

6. It is said that in so far as the act relates to counties already under township organization, it is void, because it changes the organization of the county without submitting the question to a vote of the electors as required by section 5 of article 10 of the constitution. This section we have already quoted. It requires the legislature to provide for township organization and then provides, in effect, that a majority of the legal voters of a county at a general election may adopt such organization, and, in a manner to be provided by law, may vote upon the question of continuing or discontinuing the same. In other words, the constitution gives to the voters of the county the right to determine whether or not township organization shall prevail;

but it leaves to the legislature the authority to provide the details of township government. The legislature, without submission to the people, may provide any system of township organization it sees fit, and consequently, having provided such a system, it may amend it, or it may repeal it altogether, provided it enacts a new system to take its place. The *referendum* provided by the constitution is merely upon the general question of adopting or continuing township organization. The details of township government are for the legislature, and if the legislature sees fit to so change the method of township government that the voters of a county having adopted township government do not desire to continue it under the new method, they still have the means through the *referendum* given by the constitution of discontinuing that organization. This is all that the constitution requires.

7. The next argument falls for the most part within what has already been said in regard to the amendatory character of this act, but suggests another question which requires separate treatment. It is that the act, in requiring supervisors who live in the same district to cast lots to ascertain who shall remain in office, creates new county officers, and provides for their selection by lot instead of election, as required by article 10, section 4, of the constitution. The answer to this is, that no new officers are elected by casting lots. The officers required to do so have already been elected. The casting of lots only determines which one of those already elected shall cease to be an officer, and it is not contended that the legislature has no power to discontinue the office. So far as the act provides for appointments, in case there are no supervisors within the district, it is merely for the purpose of provisionally filling the office until an election can be had. Provisions for such temporary appointments exist in regard to many offices, and their validity is not now open to question.

8. Finally, it is suggested in argument that the act is

invalid because it provides that there shall be but one justice of the peace for each township. So far as this argument is based upon the ground that it operates as an amendment of the election law providing for two justices in each precinct, it has been met by what has already been said. But it is argued in addition to this that such a provision is void for want of uniformity, under section 19, article 6, of the constitution, providing that all laws relating to courts shall be general and of uniform operation. We might dispose of this latter branch of the case upon the ground that the provision referred to, if void, is not so interwoven with the rest of the act as to invalidate the whole act. But for the purpose of setting the whole question at rest we prefer to treat the argument upon its merits. The case is, in this aspect, directly in line with that of *State v. Berka*, 20 Neb., 375, holding that a statute limiting the number of justices in cities of the first class to three is not obnoxious to the constitutional provision referred to. It was there said that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. This law applies to all counties adopting township organization, and all counties may do so. It is, therefore, of uniform operation.

9. We have treated this case as properly involving the constitutionality of the act in question, although counsel for the relator contends with vigor that, irrespective of that question, the writ should issue, and earnestly asks the court to pass upon the question as to whether a ministerial officer, having no personal interest, can justify his refusal to act under a statute on the ground that the statute is in conflict with the constitution. We had thought it settled, at least since the decision of *Marbury v. Madison*, 1 Cranch [U. S.], 137, that the constitution is the supreme law, binding

upon the legislature, as well as upon every citizen, and that no act of the legislature repugnant to the constitution can become a law for any purpose. A different doctrine has of late been revived, and it would even seem has received acceptance in a modified form by some courts. There can, however, in our mind, be no escape from these propositions, that the constitution is the fundamental law, that an act of the legislature repugnant thereto is not merely voidable by the courts, but is absolutely void and of no effect whatever. It is no law, and binds no one to observe it. The officers of this state are sworn to support the constitution. Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by *mandamus* compel them to do so. It is, therefore, a complete answer to an application for such a writ that the statute seeking to impose the duty is violative of the constitution. But the courts themselves will enforce a statute unless it is clearly repugnant to the constitution, and in discharging the functions of their offices ministerial officers should, of course, exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it. The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts. They always disregard them at their peril; but when they do disregard them, and the question is presented to the court as to whether or not obedience will be compelled, the question of the validity of the act is presented, and obedience will not be compelled if the act is unconstitutional, because in that case it is no law and imposes upon no one any duty. Of the cases cited in support of a contrary view two are found in our reports, but they are not authority for the contention of counsel. One is

Cooperrider v. State.

State v. Douglas County, 18 Neb., 506. In that case the court refused to pass upon the constitutional question because the case was submitted on the eve of the election to which the case related and practically without argument. The other case is *State v. Stevenson*, 18 Neb., 417. The court there did pass on the constitutional question, and then added, what was clearly under the circumstances *obiter*, that an act of the legislature should be respected until declared invalid by the judiciary in a proper legal proceeding. This language must have been used without due reflection. If an act must be respected until its invalidity is declared by the judiciary in a proper proceeding, then the constitution is utterly ineffectual. Such a proceeding can never arise until some one refuses obedience to the act.

JUDGMENT AFFIRMED.

THOMAS J. COOPERRIDER ET AL. V. STATE OF NEBRASKA, EX REL. WILLIAM H. STEVENS ET AL.

FILED OCTOBER 1, 1895. No. 7999.

1. **Township Organization:** STATUTES: CONSTITUTIONAL LAW. *Van Horn v. State*, 46 Neb., 62, reaffirmed.
2. **Mandamus:** WRIT AGAINST BOARDS AND CORPORATIONS. In an action for a *mandamus* to compel the performance of a duty imposed upon the governing body of a corporation, such as a county board, it is proper to name as respondents and direct the writ against the individuals holding the offices in their official capacity.
3. —: **PARTIES.** Members of the board may in such case be relators, and when they are such there is no defect of parties if all the members of the board who are not relators are made respondents.
4. —: **SUPERSEDEAS.** Where a peremptory writ of *mandamus* has been awarded, the allowance of a *supersedeas* rests within the judicial discretion of the trial court.

ERROR from the district court of Adams county. Tried below before BEALL, J.

Capps & Stevens, for plaintiffs in error.

W. P. McCreary, contra.

IRVINE, C.

The relators applied to the district court of Adams county for a writ of *mandamus* to compel the respondents, as members of the board of supervisors, to convene and divide the county into supervisor districts and select supervisors according to the provisions of Session Laws, 1895, chapter 28. The district court allowed the writ, and the respondents prosecute error.

The case on its merits presents the same questions as are decided in *Van Horn v. State*, 46 Neb., 62, and the same reasons control its decision. In this case there are, however, certain assignments of error relating to the form of the proceedings. These require separate notice. The relators in this case are themselves members of the board of supervisors. The respondents are the remaining members of the board. The prayer is for a writ compelling the respondents to convene with the relators and act. This is also the form of both alternative and peremptory writs. It is contended that in such a case the proper respondent is the corporation as such. In other words, that the writ should run not against individuals composing the board of supervisors, but against the board of supervisors by that name. In *State v. Home Street R. Co.*, 43 Neb., 830, it was said: "Where the act is a duty incumbent on a corporation, the writ may, according to circumstances, be directed to the corporation itself, to the select body of officers whose duty it is to perform the act, or to the corporation and that body jointly." An examination of the cases convinces us that according to the great weight of modern

authority the form of the writ as to the respondents is not very material. It has been held that a writ directed against a municipal corporation in its corporate name, or against the council without naming its members, is sufficient. (*Village of Glencoe v. People*, 78 Ill., 382; *City of Chicago v. Sansum*, 87 Ill., 182; *Fisher v. City of Charleston*, 17 W. Va., 595; *Wren v. City of Indianapolis*, 96 Ind., 206; *State v. City of Milwaukee*, 25 Wis., 122.) On the other hand, it has been held a proper and, indeed, a preferable practice, to direct the writ against the individuals holding the office. (*Hollister v. Judges of District Court*, 8 O. St., 201; *State Counsel v. Hickman*, 57 Ala., 338; *Commonwealth v. City of Pittsburg*, 34 Pa. St., 496; *St. Louis County Court v. Sparks*, 10 Mo., 117.) In *City of Louisville v. Kean*, 18 B. Mon. [Ky.], 9, a proceeding against the individuals was treated as one against the corporation and the corporation allowed to appeal. In *People v. Brinkerhoff*, 68 N. Y., 259, it was said that the writ should have been directed to the board of supervisors, but that it was not error to direct it to the chairman and clerk alone, they being particularly charged with the duty. It would seem, too, from some of the cases, that courts have regarded it essential to the enforcement of the writ by attachment that the peremptory writ should run against the individuals and be served upon them. But for this purpose they have issued the peremptory writ in that form, although the alternative writ was directed to the corporate body. (*People v. Champion*, 16 Johns. [N. Y.], 61; *Wren v. City of Indianapolis*, *supra*; *State v. City of Milwaukee*, *supra*.) Even the English courts of the last century were inclined to disregard technical defects in regard to the naming of respondents in the writ. (*Pees v. Major*, 1 Stra. [Eng.], 640.) It is the doctrine of the supreme court of the United States that a writ may be directed either to a city by its corporate name, or to the mayor and aldermen if it appear that these officers are the governing body. (*Mayor v. Lord*, 9 Wall. [U. S.], 409.) In such cases

the service of the writ seems to be more important than its form, but we think the better practice is to name as respondents and direct the writ against the individuals holding the office in their official capacity.

It is contended, also, that the relators, being members of the board, have no legal capacity to sue. The duty which it is sought to enforce is a public duty, and the question is one of public right. Therefore, any citizen may maintain the action. (*State v. Shropshire*, 4 Neb., 411; *State v. Stearns*, 11 Neb., 104; *State v. City of Kearney*, 25 Neb., 262.) No citizen can more appropriately bring the action than a member of the board, upon whom the duty is imposed, and whose efforts to perform it are thwarted by the recalcitrant majority of the board. It is suggested that there is a defect of parties defendant, because all the members of the board are not made defendants. It is the rule that in such cases all the officers upon whom the duty is imposed are necessary respondents. (*Lyon v. Rice*, 41 Conn., 245; *Knight v. Ferris*, 6 Houst. [Del.], 283; *State v. Jones*, 1 Ired. [N. Car.], 129.) In a case like the present it has been held proper for the relator, being a member of the board, to make himself also a respondent (*Cooper v. Nelson*, 38 Ia., 440), but we think that the correct view, especially under the reformed procedure, is that taken in *State v. Jones, supra*, holding that while the writ must be directed to all the members, still, where a portion of the members accept service and assent to the performance of the act, a writ directed against the remaining members is sufficient, as all have been thus brought before the court and are subject to penalty for contempt. Here all the members of the board are before the court. The relators asking for the writ here are as much bound by the record as the respondents. The writ requires the respondents to meet with the relators, and there can be no doubt that upon this record the writ may be enforced against every member of the board, whether relator or respondent.

State v. Holcomb.

The district court refused to allow a supersedeas, and its action in this respect is assigned as error. It is doubtful whether the question is properly presented in this manner, but be that as it may, there was no reversible error. The question was before this court in *State v. Judges*, 19 Neb., 149. It was there intimated that in a case not provided for by statute the district court might, where great hardship or wrong would be the result of enforcing the order before the appeal was decided, grant a supersedeas; but that for a supersedeas in such cases there was no statutory authority, and the district court could not be compelled to allow it. From this it would seem that the allowance of a supersedeas in a *mandamus* case rests within the discretion of the district court. This is the rule as to *quo warranto*. (*Gandy v. State*, 10 Neb., 243.) No abuse of discretion in this case appears.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. O. HORNE, V. SILAS A.
HOLCOMB, GOVERNOR.

FILED OCTOBER 3, 1895. No. 7769.

1. **Constitutional Law: CONTEMPORANEOUS CONSTRUCTION.** A contemporaneous construction of a constitutional provision, which has for many years been adhered to by the legislative and executive departments of the government, will not be disregarded by the courts, and in doubtful cases will generally be held conclusive.
2. **Trustees for Institution for the Blind: ELECTION BY LEGISLATURE: CONSTITUTIONAL LAW.** Session Laws, 1875, p. 150, sec. 2, providing for the election by the legislature of trustees for the institution for the blind, is repugnant to section 10, article 5, of the constitution, and was thereby repealed.

ORIGINAL application for *mandamus* to compel the governor to approve the bond of relator as treasurer of the board of trustees of the institution for the blind at Nebraska City. *Writ denied.*

John C. Watson and *S. G. Hutchinson*, for relator, cited: *State v. Bacon*, 6 Neb., 286; *Curtis v. Allen*, 43 Neb., 184; *State v. Plambeck*, 36 Neb., 401; *Beck v. Jackson*, 43 Mo., 117; *Cooley*, Constitutional Limitations, 184; *Pleuler v. State*, 11 Neb., 547; *State v. Smith*, 35 Neb., 24; *People v. Morgan*, 90 Ill., 558; *Wilcox v. People*, 90 Ill., 186.

Darnall & Kirkpatrick, *contra*, cited: *State v. Kennon*, 7 O. St., 566; *People v. Loewenthal*, 93 Ill., 196; *Jackson v. Board of Supervisors of Washington County*, 34 Neb., 680; *Coutant v. People*, 11 Wend. [N. Y.], 511; *State v. Bacon*, 6 Neb., 286; *Clark v. Stanley*, 66 N. Car., 59; *People v. McKee*, 68 N. Car., 429; *People v. McGowan*, 68 N. Car., 520; *Bunn v. People*, 45 Ill., 410; *State v. Hyde*, 22 N. E. Rep. [Ind.], 644; *State v. Peele*, 22 N. E. Rep. [Ind.], 654; *State v. Denny*, 21 N. E. Rep. [Ind.], 252; *State v. Board of Public Lands & Buildings*, 7 Neb., 42; *In re Board of Public Lands & Buildings*, 18 Neb., 340.

POST, J.

This is an application to this court in the exercise of its original jurisdiction for a writ of *mandamus*, requiring the respondent, as governor, to approve the relator's bond as treasurer of the board of trustees of the institution for the blind at Nebraska City. It appears from the pleadings upon which the cause is submitted that the legislature, on the 5th day of April, 1895, elected trustees for the institution above named as follows: Webster Eaton and F. E. McKeeby, to serve until March 4, 1897; and J. L. Fisk and D. W. Crane, to serve until March 4, 1899; and W. L. Wilson and the relator, O. Horne, to serve until March 4,

1901. The relator, having been named as treasurer for the board so chosen, presented for approval his official bond which is conceded to be in all respects sufficient, but the respondent refuses, for reasons hereafter appearing, to approve said bond, or to take any action whatever with respect thereto. The relator's claim is founded upon the provisions of sections 2 and 10 of the act of February 19, 1875, entitled "An act to erect and maintain an institution for the blind," as follows:

"Sec. 2. Such institution shall be under the supervision of a board of trustees, consisting of six persons, who shall be elected by the legislature of the state in joint convention as soon as practicable after the passage of this act. Two of said trustees shall be elected and serve until the fourth of March, A. D. 1877, and two shall be elected to serve until the fourth of March, A. D. 1879, and two shall be elected to serve until the fourth of March, A. D. 1881, and thereafter said trustees shall be elected by joint convention of the legislature and hold their office for six years."

"Sec. 10. The board of trustees shall elect one of their number president and another treasurer of the institution, and the treasurer shall enter into bonds with security in the sum of not less than ten thousand dollars, to be approved by the governor and auditor of state, conditioned for the faithful performance of his duties and the honest disbursement of, and accountal for, all moneys belonging to the institution which may come into his hands, which bond shall be filed with the secretary of state."

Section 23 of an act approved February 28, 1881, entitled "An act concerning official bonds and oaths," contains a provision expressly repealing section 10 above quoted, although that act is by both parties treated as void in so far as it relates to the subject of this proceeding, on the ground that the repealing clause thereof is not germane to the title. It is unnecessary in this connection to determine the

effect of the attempted repeal, since we prefer to rest our conclusions upon other and more satisfactory grounds.

A question distinctly presented by this record, and which must be regarded as decisive of the controversy, is whether section 2 of the act of 1875 was abrogated by the provisions of section 10, article 5, of the constitution of 1875, which took effect November 1 of that year, and which reads as follows:

"Sec. 10. The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature."

These provisions of the constitution, it must be confessed, are wanting in the clearness and precision which characterizes that instrument as a whole. However, a careful analysis of the above section discloses that power is thereby conferred upon the governor to appoint two classes of officers, viz., (1) those whose offices are established by the constitution itself, and (2) those whose offices are created by law and whose appointment or election is not otherwise provided for. The phrase, "whose appointment or election is not otherwise * * * provided for," is an apparent limitation upon the preceding general language, and read by itself impliedly authorizes the legislature to prescribe the manner of selecting all officers of its own creation. The words "by law or herein" add nothing to the force or effect of the provision, since the only officers known to our system are those established by the constitution, and such as are created by law in harmony therewith; but the last clause of the section is in the nature of a proviso, in turn limiting the power of the legislature over the subject, and upon the scope and effect of that limitation must our con-

struction depend. The word "such" therein was not used inadvertently, and without doubt refers to one or both of the classes of officers contemplated by the first clause of the section. It cannot, it would seem, refer to the first class, since the governor is, as we have seen, expressly authorized to appoint all constitutional officers, and which authority is an obvious limitation upon the power of the legislature. It must, therefore, apply to offices created by law, and be construed as expressly prohibiting the appointment or election of officers by the legislature.

There are other considerations which should be mentioned, and which furnish the most satisfactory reasons for the conclusion above stated, some of which will be briefly noticed. It is a notorious fact, well authenticated by history and the public records of the state, that the practice of the legislature under the former constitution in appointing officers and members of boards charged with the government and control of public institutions had resulted in great abuse and public scandal, and that the constitutional restriction under consideration was designed as a remedy for that evil.

Our conclusion is also strongly supported by contemporaneous constructions of the executive and legislative departments of the government. As illustrative of the foregoing proposition may be mentioned the fact that upon the adoption of the present constitution the executive officers of the state assumed control of the public institutions, including the institution for the blind, the trustees thereof, who held by appointment of the legislature, voluntarily retiring; and at no time thereafter, until the year 1895, has the legislature assumed the power to appoint or elect officers not essential to the business of its own department. In more than one instance has the legislature determined the question at issue adversely to the claim now urged in its behalf. For instance, during the session of 1893 a communication was by the governor addressed to the com-

mittee in charge of House Roll No. 81, being a bill for "An act for the issuing of state bonds for the purpose of providing supplies for citizens suffering from loss of crops," etc., calling attention to the fact that said measure was in conflict with the constitution by reason of a provision naming commissioners to distribute the proceeds of the bonds thereby authorized. Thereupon, on motion of the distinguished attorney for the relator, then a member of the house, the objectionable provision was stricken out and the bill so amended as to authorize the appointment by the governor of the proposed commission, and in which form it subsequently became a law. To pursue the subject in this connection would be without profit, since none will controvert the proposition that this section of the constitution was understood by its framers and the people by whom it was ratified as an express limitation upon the power of the legislature, and that the popular construction thereof was by all departments of the state government adhered to without question for more than nineteen years. Such a practical exposition, if not indeed conclusive, should at this late day be accorded the highest consideration by the courts in giving effect to its provision involved. It is said by Marcy, J., in *People v. Green*, 2 Wend. [N. Y.], 274: "Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded." And in a recent work on the subject it is said: "A construction of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive." (Sutherland, *Constitutional & Statutory Construction*, 307. See, also, Endlich, *Interpretation of Statutes*, 357, *et seq.*; Sedgwick, *Construction of Statutory & Constitutional Law*,

552; *Scanlan v. Childs*, 33 Wis., 663; *Cohens v. Virginia*, 6 Wheat. [U. S.], 265; *Packard v. Richardson*, 17 Mass., 143; *Opinion of Judges*, 126 Mass., 551; *Chesnut v. Shane*, 16 O., 599; *Jackson v. Washington County*, 34 Neb., 680; *State v. Smith*, 35 Neb., 13; *United States v. Union P. R. Co.*, 148 U. S., 562.) But we are fortunately not without adjudications in point. In *State v. Stanley*, 66 N. Car., 59, a statute authorizing the appointment of certain public officers by the speaker of the house of representatives and president of the senate was held to have been abrogated by the constitution of that state which provides: "The governor shall nominate and by and with the advice and consent of a majority of the senators elect, appoint, all officers whose offices are established by this constitution, or which shall be created by law, and whose appointments are not otherwise provided for; and no such officer shall be appointed or elected by the general assembly." (Constitution, N. Car., sec. 10, art. 3.) We are unable to perceive wherein the foregoing differs essentially from the provision of our constitution above quoted. Indeed, the only difference observable is the use in ours of the words "by law or herein," which, as we have seen, add nothing to the force of the section in which they are employed. The court in the case cited say, referring to the last clause of the section quoted, that the words thereof "are superadded as an express veto upon the power of the general assembly to appoint or to elect an officer, whether the office is established by the constitution or shall be created by an act of the general assembly." To the same effect see *People v. McKee*, 68 N. Car., 429, and *People v. McGowan*, 68 N. Car., 520. It follows that section 2 of the act of 1875, authorizing the election by the legislature of trustees for the institution for the blind, is repugnant to the present constitution and was thereby repealed. The writ is accordingly

DENIED.

NORVAL, C. J., concurs.

HARRISON, J., dissenting.

This is an original application to this court praying that a writ of *mandamus* issue, directing the Hon. Silas A. Holcomb, as governor of this state, to approve the bond of the relator, O. Horne, as treasurer of the institution for the blind at Nebraska City. The complaint or petition of the relator is as follows:

"Your relator complains and alleges for that the respondent herein, the Hon. Silas A. Holcomb, is now, and since the 3d day of January, 1895, has been, the duly elected, qualified, and acting governor of the state of Nebraska; that the relator herein is a citizen and resident of the county of Otoe and state of Nebraska.

"Your relator further alleges that on the 19th day of February, 1875, there was approved an act of the legislature of the state of Nebraska entitled 'An act to erect and maintain an institution for the blind,' the second section of which act is as follows:

"'Sec. 2. Such institution shall be under the supervision of a board of trustees consisting of six persons, who shall be elected by the legislature of the state in joint convention as soon as practicable after the passage of this act. Two of said trustees shall be elected to serve until the fourth of March, A. D. 1877, and two shall be elected to serve until the fourth of March, A. D. 1879, and two shall be elected to serve until the fourth of March, A. D. 1881, and thereafter said trustees shall be elected by joint convention of the legislature and hold their office for six years.'

"Your relator further alleges that the term of office of each member of the board of trustees of said institution for the blind, heretofore elected, having expired and there being a vacancy in each membership of said board of trustees, the legislature of the state of Nebraska, in pursuance of the provisions of said act approved as aforesaid, during a regular session thereof at the capitol in the city of

Lincoln, met in joint convention on the 5th day of April, A. D. 1895, and proceeded according to law to elect a board of trustees for said institution for the blind, consisting of six persons, who were elected to serve as follows: W. L. Wilson and O. Horne, of Otoe county, to serve until March 4, 1901; J. L. Fisk, of Gage, and D. W. Crane, of Keith, to serve until March 4, 1899; Webster Eaton, of Lancaster, and F. E. McKeeby, of Webster, to serve until March 4, 1897. A copy of the certificate of the election of the relator herein is hereto attached, and marked 'Exhibit A.'

"Your relator further alleges that each person so elected as one of the trustees for said institution for the blind as aforesaid took the oath of office and qualified according to law, and each entered upon the discharge of his duties; that the said above named W. L. Wilson, O. Horne, J. L. Fisk, D. W. Crane, Webster Eaton, and F. E. McKeeby, trustees of said institution for the blind, elected as such on the 5th day of April, A. D. 1895, by the legislature of the state of Nebraska in joint convention assembled, are the sole and only trustees that have been elected by said legislature; that no other person or persons have been named, appointed, or elected as trustees of said institution other than the persons named above, and that no other person or persons are claiming to act for or represent said institution or discharge the duties as trustees of said institution; that at a regular meeting of said board of trustees for the institution for the blind held at said institution in the city of Nebraska City, Nebraska, on the 15th day of April, 1895, said board of trustees elected W. L. Wilson, one of their number, as president, and thereupon elected O. Horne, also from among and one of their number, as treasurer of said institution for the blind, which said election was done and held in pursuance of said act above referred to, the tenth section of which is as follows:

"Sec. 10. The board of trustees shall elect one of their

number president, and another treasurer of the institution, and the treasurer shall enter into bonds with security in the sum of not less than ten thousand dollars, to be approved by the governor and auditor of state, conditioned for the faithful performance of his duties and the honest disbursement of, and accountal for, all moneys belonging to the institution which may come into his hands, which bond shall be filed with the secretary of state.'

"Certificate attached, marked 'Exhibit C.'

"Your relator further alleges that in accordance with the requirements of said act approved as aforesaid he entered into bonds as the duly elected treasurer of said institution for the blind, with security in the sum of fifteen thousand dollars, conditioned for the faithful performance of his duties, and the honest disbursement of, and accountal for, all moneys belonging to said institution which may come into his hands, which bond he presented to his excellency Silas A. Holcomb, governor of the state of Nebraska, being the respondent herein, that he approve said bond as required by said act, but your relator here makes known to this honorable court that his excellency the said Silas A. Holcomb, governor as aforesaid, refused, and still refuses, to approve said bond; that his excellency the said Silas A. Holcomb, governor as aforesaid, informed the relator herein that he was satisfied with the amount of said bond and the sufficiency of the sureties thereon, but that the legislature of the state of Nebraska had not the power or authority under said act to elect said board of trustees for the institution for the blind aforesaid. A copy of said bond is hereto attached, marked 'Exhibit B.'"

To which the respondent filed the following answer:

"Now comes the respondent, and for answer to the petition of relator filed herein admits that he is the duly qualified and acting governor of the state, and that the relator is a citizen and resident therein. Respondent further answering admits the enacting and approval of an act entitled

'An act to erect and maintain an institution for the blind,' as mentioned in relator's petition, but respondent alleges that after the passage of the act aforesaid the new constitution of the state, known as the 'Constitution of 1875,' was adopted and ratified by the people of the state, and among other provisions of said constitution article 5 thereof contains the following section, viz.:

"Sec. 10. The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature.'

"Respondent further answering says that the portion of the act mentioned by relator which provided for the election of trustees by the legislature was by said section 10 of the constitution amended and repealed, and is not now, and was not at the date mentioned in relator's petition, of any force and effect, and all branches of the state government have so regarded and acted upon said statute. Respondent admits that the legislature elected trustees for said institution at the session when the act was passed, but alleges that the legislature has never made or attempted to make an election of trustees for said institution since, until the pretended election made in 1895, mentioned in relator's petition.

"Respondent further answering admits that the legislature done and performed the acts mentioned in relator's petition, but denies that said acts amounted to or constituted an election of relator and the other persons named to the office of trustees of said institution. Respondent alleges that said pretended election and all proceedings taken and had in and about the same by the legislature were contrary to the constitution and laws of the state and were null and void.

"Respondent further answering admits that relator and the other persons in his petition mentioned have pretended to qualify as trustees and have made a pretended election of relator as treasurer of said institution, as in relator's petition set out, but respondent alleges that all acts of said trustees are without color or authority of law and are null and void. Respondent further alleges that he as the chief executive of the state has full charge and control of said institution and has the sole right and authority to appoint the trustees and other officers for said institution.

"Respondent further answering alleges that among the provisions of the constitution of the state adopted in 1875 in article 2 thereof is a section in the following language, viz.:

"Section 1. The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

"Respondent alleges that the executive branch of the state government, either the board of public lands and buildings or the predecessors in office of respondent, have had the exclusive control and management of said institution for the blind ever since the adoption of said constitution, and respondent herein has sole right and authority to appoint trustees and other officers therefor.

"Further answering respondent admits that relator and the other persons mentioned in his petition claimed to act as trustees of said institution, but denies that they have possession and control of the same. Respondent further answering admits that relator has made and tendered to respondent a bond as mentioned in his petition, and that the same is in due form, and that the sureties thereon are good and sufficient, and that respondent has refused to approve the same. Wherefore respondent prays that relator's ap-

plication may be dismissed and that respondent may go hence and recover his costs."

There was no testimony adduced on behalf of either party, and the disposition of the controversy must be determined from a consideration of the issues and questions involved as raised and presented in the petition and answer. As stated in the pleadings filed by relator, there was passed, during a session of the legislature of 1875, an act establishing an institution for the blind and providing for the election of a board of trustees to manage the affairs of the institution. It was further provided in section 4 of the act referred to, as follows: "The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants, and necessities for the institution, and perform all other acts necessary to render the institution efficient and to carry out the purposes of the establishment." It does not appear from the pleading when the first board of trustees was elected, but it is conceded by both parties in the argument in briefs filed, and is a fact, that the legislature which enacted the law, it being passed in such a manner as to take effect and be in force from and after its passage, and being approved February 19, 1875, elected a board, and this board assumed control of the institution and continued its management until the year 1877, when charge of its affairs was taken by what is known as the board of public lands and buildings. This board was created by section 19, article 5, of the "Constitution of 1875," which became the fundamental law of the state after the time of the passage of the act establishing the institution for the blind. The section referred to is as follows: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for

educational purposes; and shall perform such duties and be subject to such rules and regulations as may be prescribed by law." The powers and duties of this board were defined by an act of the legislature February 13, 1877. We will further state here that during the month of October, 1877, an opinion was rendered by this court in the case of the *State v. Bacon*, 6 Neb., 286, in which it was decided that the institution for the blind was not an educational institution and not within the exception of section 19, article 5, of the constitution, and was within the control of the board of public lands and buildings; but in an opinion filed January 2 of the current year it was determined by the court to be an educational institution within the meaning of the exception contained in section 19, article 5, of the constitution (*Curtis v. Allen*, 43 Neb., 184), and the legislature, on the 5th day of April of this year, elected a board of trustees for the institution for the blind as provided in the act of 1875, and on the 15th of the same month the persons so selected held a meeting at which the relator was chosen to fill the office of treasurer of the board of trustees and prepared and presented his bond as such officer to the respondent for approval, as admitted in the pleadings, with the result as therein stated.

It is insisted by the respondent that section 2 of the law of 1875, which created this board of trustees and provided the manner of its election, is in direct conflict with the constitution of 1875, which, as I have stated, became of force after the act in question was in effect, and that by the adoption of the constitution and its becoming the primary law of the state the portion of the act referred to was abrogated and repealed, and the office of member of the board of trustees was abolished, or the appointment to it vested in the governor. To support this contention counsel for the governor quote in their brief a number of sections of the constitution, some of which, it is claimed, have direct bearing upon the question at issue and others

are in point only as tending to disclose by their terms the general policy or sentiment which prompted their incorporation in the instrument and its adoption, and it is urged that they were of the same nature as the views and reasons underlying the theory advanced by counsel for respondent. The first of these sections of the constitution which I will notice is section 1, article 2, which is as follows: "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." This section merely states the departments or divisions of the state government. It does not define the powers and duties which shall pertain to any division. This is left as a task to be performed in other sections of the same instrument, and in laws enacted in pursuance of its provisions. It is, however, well settled that "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law." (Cooley, Constitutional Limitations, p. 108, and cases cited.) Counsel for respondent insist that appointment to office is distinctly within the purview of the executive division, or is an executive function, and that when the people of the state adopted the present constitution, they sought to establish this principle, or rule, and the court should give this due weight in construing what is said in the constitution in regard to offices and appointments thereto, and, so far as possible, give it full scope and effect. In the brief of respondent is the following quotation upon the subject of appointment to office being peculiarly within the powers of the executive: "Mr. Jefferson, in a letter to Samuel Kercheval, dated July 12th, 1816, said: 'Nomination to office is an executive function. To give it to the legislature, as we do [in Virginia], is a violation of the principle

of the separation of powers. It swerves the members from correctness by temptations to intrigue for offices themselves and to a corrupt barter of votes; and destroys responsibility by dividing it among a multitude.” (Jefferson’s Complete Works, vol. 7, p. 12.) And the view that nomination to office is an executive function, and intrinsically so, has been adopted by a number of the courts, while the contrary view has also been adopted by some, and in a dissenting opinion by Elliot, C. J., in the case of *State v. Hyde*, 22 N. E. Rep. [Ind.], on page 652, it is said: “Perhaps the principle has never been more clearly stated than by the great constitutional lawyer whose statements, as Emerson says, ‘lay in daylight.’ That lawyer said: ‘The inferences which I think follow from those views of the subject are two: First, that the denomination of a department does not fix the limits of the power conferred on it, nor even their exact nature; and second (which, indeed, follows from the first), that in our American governments the chief executive magistrate does not necessarily, and by force of his general character of supreme executive, possess the appointing power. He may have it, or he may not, according to the particular provisions applicable to each case in the respective constitutions.’ (Webster’s speech on the presidential protest.)” From all of which it appears that there was not a unanimity of opinion upon the question among our ablest minds in the past, or the courts, or judges of the same courts. This court has said as to the division of power and the exercise of power properly belonging to one by the others: “The powers of the state government are divided into three distinct departments, the legislative, the executive, and judicial, and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the constitution. Under this division of distinct departments of the government, the apportionment of power to one department will, of itself, imply an inhibi-

tion of its exercise by the others." (*Turner v. Althaus*, 6 Neb., 69.) If this court was also committed to the doctrine that appointment to office is essentially or exclusively considered in the abstract an executive function and our constitution stopped with the provision last quoted, the solution of the problem presented in this case would not be difficult. All power is inherent in the people. This statement is not new and contains nothing startling, but it is well that it be repeated and kept strongly in mind, and its exercise by those to whom it is delegated be directed toward furthering the best interests of the beneficiaries of the trust. In government this power is necessarily delegated by its primary possessors, portions of it to bodies of men, such as is the legislature in our own and sister states. Other portions more properly to one man, as our governor. This is usually done through the medium of what is known as a constitution, and history gives us many accounts of struggles by the people to repress, abridge, and circumscribe a dangerous extension of delegated power, at times by an executive, and at others by the legislative body. Some of the United States at the inception of their existence adopted constitutions in which the power to elect or appoint officers was lodged in the legislative department, and in constitutions adopted at a later date in their state life changed this and either made the offices mainly elective or gave their nomination to the executive. It is stated that the reason for this after or later action was that it had been discovered that the exercise of the elective or appointive power to office, generally, by the legislature was corrupting, dangerous, and injurious to the best interests of the states where it prevailed. In our state, under the provisions of the constitution in force prior to and at the time of the adoption of the present one and the construction given to the portions of the old constitution in relation to offices and appointment or election thereto, the legislature had and exercised such power, an instance of the right to

exercise the power being the passage of the law under which the relator claims title to the office of trustee, and its placing the selection of trustees in the legislature, and of which, under the old constitution, no question would or could have successfully been raised. This shows beyond a doubt that up to the time of the adoption of the constitution of 1875 the doctrine that the power of appointment of officers was intrinsically an executive function or inherent in the executive department of our state government was not prevalent and did not obtain to any extent or in any degree. In the new constitution the draughtsman of the instrument, the convention which considered and arranged it for submission to the source of power, the people, from whose approval it must derive vitality and force, placed in it the section hereinbefore quoted by which the departments of the state government were clearly defined, and expressly prohibited the exercise of any proper power of any one of them by either of the others, and further, in section 10 of article 5, which is as follows: "The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature,"—did not leave the duties of the chief executive officer in relation to appointment of officers to speculation or conjecture or to be determined by construction, but I think distinctly, and in unmistakable terms, defined the duties of the chief executive in respect to the appointment of officers and the offices to which they should apply and include, and here did not recognize the doctrine of the intrinsic right of the executive to control nominations to office, but excepted such as were otherwise provided for in the instrument, or might be otherwise provided for by law,

and this must be presumed to have been intentionally done, for the framers of the constitution and the body which arranged it for submission were no doubt painstaking and careful and examined and weighed the words, phrases, and sentences of the sections and articles and debated their effect before allowing them to become constituents of the instrument. Hence I conclude that the doctrine invoked by counsel for respondent, of the inherent right of the executive department to appoint officers, is not entitled to and should not be accorded any very great weight or further consideration in the determination of the questions herein involved. I am not at this time called upon to define or prescribe generally the boundaries or limitations of the exact powers or duties of either the executive or legislative department, this being a subject upon which a particular direction is made in the constitution itself.

If the section of the law under which relator claims title to the office of trustee and treasurer of the board of trustees is clearly in conflict with the terms of the constitution, or any section or sections of it, or inconsistent therewith, then it was annulled and must be declared void, but not unless unmistakably so. If there exists a doubt upon the subject it must be allowed to prevail in favor of the law. "The repugnancy which must cause the law to fall must be necessary and obvious; if by any fair course of reasoning the law and the constitution can be reconciled, the law must stand." (*Cass v. Dillon*, 2 O. St., 608.) It is provided in the constitution, which it is claimed abrogated this law, that all laws in force at the time of the adoption of this constitution not inconsistent therewith shall continue to be as valid as if this constitution had not been adopted. The task then to be performed in the present controversy is to construe section 10, above quoted, according to the established rules of construction in such cases, one of which is to discover, as nearly as may be, the intention of the body which framed and submitted and also of the people who adopted

it; and another is that "its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people, and they judged it by the meaning apparent on its face, according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense." (Sedgwick, Construction of Statutory & Constitutional Law, p. 413.) "The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. * * * Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. 'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning.' * * * In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, C. J., says: the framers of the constitution and the people who adopted it 'must be understood to have employed words in their natural sense and to have intended

what they have said.''" (Cooley, Constitutional Limitations, pp. 69-73.) And POST, J., in *Curtin v. Atkinson*, 36 Neb., 115, says: "One of the most familiar rules of construction is that words are to be taken in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the framers of the instrument, or would lead to some other inconvenience or absurdity. (Sedgwick, Construction of Statutory & Constitutional Law [2d ed.], p. 220.)" Bearing these rules and directions in mind, I will now attempt to ascertain the meaning of section 10, article 5, the one by which the appointive power as to offices is conferred upon the governor and a limitation or prohibition in that respect placed upon the legislative powers. This section provides that the appointing power as to the two classes of officers shall be in the governor: First, "all officers whose offices are established by this constitution;" second, "or which may be created by law." This second class, giving to the words describing the officers included in it their ordinary acceptance or meaning, clearly included only the officers whose offices may be created or brought into being or existence by law in the future, not what had or then existed, and the offices of trustees, having been created in 1875 and prior to the adoption of the constitution, were not included in either class of offices referred to in section 10, and to be filled by appointment by the governor. The clause, "and no such officer shall be appointed or elected by the legislature," clearly refers to any and all officers covered by the section in which it is contained, and not to any offices or officers not included in the section. The propriety or policy of placing this inhibition upon the powers of the legislature to fill by appointment or election any of the offices referred to I need not comment upon or discuss, nor whether or not it should have included some which are not within the plain and ordinary meaning of its terms and by construction read them in. I am not seeking now to ascertain what should

or ought to have been the constitutional provisions in this particular, but what, from the import of the words or language employed, is it, or does it provide. If the makers of the constitution had desired to make the foregoing inhibition apply to all officers, apt terms could and would have been employed to make certain their intention, and this is just as true of the words and phrases used in conferring the appointive power to the extent they did, upon the governor. If it had been their intention to cover the office claimed by relator, language could and would have been used which would have effected the purpose and not left it to be done, if at all, by the aid of a doubtful and uncertain construction.

I have examined the cases cited by respondent, among them those in the 66 N. Car., 59, and 68 N. Car., 429, 520, and another case in the same report, page 457, on the same subject, the North Carolina cases all being in part in relation to the construction of a section of the constitution of that state treating of appointment of officers and in whom shall be lodged the appointive power. The section of the constitution of North Carolina referred to is as follows: "The governor shall nominate and by and with the advice and consent of a majority of the senators elect, appoint all officers whose offices are established by this constitution or which shall be created by law, and whose appointments are not otherwise provided for; and no such officer shall be appointed or elected by the general assembly." In construing this section the North Carolina court states that "the words 'whose appointments are not otherwise provided for'" evidently meant provided for by the constitution, thus eliminating from the section any question of the appointment or election of any officer or officers being provided for by law, and making the section of the constitution under consideration, and construed in the cases cited, radically different from the corresponding section of our constitution in respect to the appointment of officers by the chief executive

of the state, and the above construction of the portion of the section of the constitution of North Carolina naturally follows from, and is largely founded upon and induced by, the proposition that the appointive power as to officers is strictly an executive function, and that it was the intention of the framers of the North Carolina constitution and of those who adopted it, that since to the governor it most properly belongs, to him it should be given, and that to the exclusion of all others, unless in the same instrument which conferred such power upon him an exception as to any officer or officers was clearly expressed and provided, while in our fundamental law, in the portion in which the governor is vested with the appointive power as to certain officers, it is stated in clear and unmistakable terms that officers of the classes therein specified whose appointment or election is not otherwise by law or in the constitution provided for, he shall make the appointments, undoubtedly excepting officers for whose appointment or election the legislature, the department of state government nearest the people, shall prescribe by law other methods, or lodge the power in a person or persons other than the governor, clearly indicating that it was not the idea of the framers of our constitution, or the people by whom it was adopted, that the power to appoint officers was exclusively an executive function. The foregoing are some of the thoughts and reasons which lead me to conclude that the cases cited need not be considered as decisive of the points in controversy in the case at bar, and hence I do not feel constrained to follow the doctrine and rules announced in them.

Counsel for respondent, in a very forcible manner, invoke the rule of what is denominated "contemporaneous construction,"—the construction placed upon the constitution by one or more co-ordinate departments of the state government at the time of its taking effect as the primary law of the state, and claim that by the changes

which occurred at or near the same time in the affairs of the institution for the blind and the management thereof it was manifestly evidenced that it was considered by those interested and the departments of state concerned that the constitutional provisions in relation to offices and officers had destroyed the force of the provisions of the prior law of 1875 in respect to the officers of such institution and the source of their appointment and election. I have no desire to run counter to or conflict with what is known as the rule of contemporaneous construction, or to deny the rule its full force and significance, but my understanding is that where the text of the article or section to be construed is so worded as not to be doubtful or ambiguous in meaning, but is clear and distinct, the meaning apparent and conveyed by the words themselves, the doctrine of contemporaneous construction is not applicable and need not be invoked, but the intent and meaning to be gathered from the article or section itself must prevail. It has been said: "But where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. * * Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law

makers. 'Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' " (Cooley, Constitutional Limitations, 82, 84.) Believing as I do, that the true intention of the section of the constitution under consideration is clearly shown in its own text, I need not go further or resort to rules for its construction. When we further recall and consider the judicial construction which was made of the provisions of the constitution of 1875, in reference to offices and appointment thereto, and their bearing upon those of the institution for the blind, very closely following the establishment of the constitution of 1875, and the subsequent judicial construction of the same constitutional provisions, and in relation to the same institution and its affairs, and the changes consequent upon the later judicial construction, and the legislative action or election of trustees which followed, it destroys much of the weight which might be given to any contemporaneous construction, conceding that it is shown in the history of the institution in question to have occurred, and I do not think it of sufficient force to control the disposition of the points discussed or to establish that the law of 1875, in so much as it referred to officers of the institution for the blind and the manner of their election, is in conflict with the provisions of the constitution of 1875 or inconsistent therewith.

Another contention of the respondent is that section 26 of article 5, which is as follows: "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created,"—is applicable and includes the trustees provided for in section 2 of the act of 1875, and that the last mentioned section is in direct conflict with the section of the constitution just quoted. With this I cannot agree. The officers referred to in section 26 of the constitution are the executive state

officers proper, and may probably be confined to those enumerated and denominated in the portion of the constitution which is devoted to defining the executive department of the state government and its officers, their powers and duties. It was said in regard to this section in connection with section 1 of the same article in the opinion in the case of *State v. Weston*, 4 Neb., 234: "It was claimed on behalf of the defendant that the office ceased to exist on the first day of November last, when the new constitution took effect. This claim is based upon sections 1 and 26, article 5, of the constitution. Section 1, among other things, provides that 'the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings;' and section 26, 'that no other executive state office shall be continued or created, and the duties devolving upon officers not provided for by this constitution shall be performed by the officers herein created.' This last section doubtless refers solely to executive state officers and to civil duties strictly executive." In this article of the constitution a distinction is drawn between the officers who may be styled strictly executive officers of the state and such officers as the trustees of the institution for the blind. Thus, in section 21 it is stated: "An account shall be kept by the officers of the executive department and of all the public institutions of the state," and again in section 22, "The officers of the executive department and of all the public institutions of the state shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such reports to the legislature, together with the reports of the judges of the supreme court of defects in the constitution and laws, and the governor or either house of the legislature may at any time require information, in writing, under oath, from the officers of the executive department, and all officers and managers of

state institutions, upon any subject relating to the condition, management, and expenses of their respective offices." I have noticed the sections of the constitution referred to by counsel for respondent and have read and construed the section more especially under consideration in connection with them and in connection with such other clauses or sections of the constitution as might have a bearing upon or affect its meaning, and, in conformity to the views hereinbefore expressed, conclude that the sections of the act of 1875 under which the relator was elected trustee of the institution for the blind and treasurer of the board of trustees, and by virtue of which he executed and presented his bond to the governor for approval, were not in conflict with the provisions of the constitution of 1875 or inconsistent therewith.

In the brief filed for respondent appears the following statement: "The right of this court to issue a writ of *mandamus*, in this or any other case, to require the respondent, as chief executive, to perform any duty of his office, or to in any matter control his discretion, is not conceded, * * but, in accordance with the agreement entered into between the relator and this respondent before the honorable judges of this court, that the entire matter of the validity of the election of the relator as treasurer, and of the election of the board of trustees of the institution, should be submitted to the court in this cause for a decision upon the merits, the respondent will not, and does not, raise nor insist upon such objection, but expressly waives any objections upon that ground." Since the point of objection suggested in the above quotation is not raised nor insisted upon, but is expressly waived, it requires no discussion.

IRVINE, RAGAN, and RYAN, CC., concur in the foregoing dissenting opinion.

N. H. WARREN & COMPANY, APPELLANTS, V. JOHN
RABEN, APPELLEE.

FILED OCTOBER 3, 1895. No. 3591.

Accounting: DECREE FOR PLAINTIFF: REPORT OF REFEREE.
Evidence examined, and *held* to support the findings of the referee. His report is confirmed and a decree entered in this court in compliance therewith.

MOTION by appellee to set aside report of referee. *Report confirmed.*

There is a former report of the case in 33 Neb., 380.

Hainer & Kellogg, for appellants.

A. W. Agee and J. H. Smith, contra.

RAGAN, C.

N. H. Warren & Co. sued John Raben in the district court of Hamilton county. From the judgment rendered therein Warren & Co. prosecuted proceedings in review to this court, which reversed *pro forma* the judgment and sent the case to a referee to hear the evidence and make certain findings and state certain conclusions of fact. The opinion of the court in this case is *Warren v. Raben*, 33 Neb., 380, where will be found a complete statement of all the facts necessary to an understanding of the case. The referee appointed by this court has heard the evidence, stated the account between the parties, together with his findings of fact, as directed, and the case is now before us on the motion of Raben to set aside the report of the referee. The grounds on which this motion is based are that the findings of the referee are not supported by sufficient evidence, and that the report is not made in accordance with the order of the court. The report of the referee

McAleer v. State.

conforms to the order of the court, and it must suffice to say that after a somewhat protracted examination of the voluminous record we are entirely satisfied that the findings made by the referee, and each of them, are sustained by sufficient evidence. The report of the referee is therefore in all things confirmed; and in accordance with said report the decree of the district court is reversed, and a decree will be entered in this court in favor of N. H. Warren & Co., and against John Raben, for the sum of \$3,255.88, together with interest thereon at the rate of seven per cent per annum from the 24th day of May, 1885, and costs of suit, in which costs are included the fee of the referee, H. A. Babcock, of \$250.

DECREE ACCORDINGLY.

NORVAL, C. J., not sitting.

JOHN MCALEER V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1895. No. 6655.

1. **Criminal Law: INSTRUCTIONS.** An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence.
2. **Embezzlement: EVIDENCE.** Section 121, Criminal Code, construed. *Held*, That the exception as to the persons within the act relating to apprentices and those within the age of eighteen does not apply to officers, agents, attorneys, clerks, or servants of incorporated companies.
3. ———: ———. The corporate character of the employer is therefore an essential element of the offense of embezzlement when employment by a corporation is charged in the information, at least unless it is both charged and proved that the defendant is not an apprentice and not within the age of eighteen years.

McAleer v. State.

4. ———: ———. To constitute embezzlement under section 121, Criminal Code, it is essential that the money or thing charged to have been embezzled should have come into the possession or care of the defendant by virtue of his employment.
5. ———: ———. A secreting with intent to convert to one's own use does not prove the offense under an information charging an actual embezzlement. To constitute embezzlement the owner must be deprived of his property by an actual adverse use or holding.

ERROR to the district court for Butler county. Tried below before BATES, J.

Steele Bros., for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

IRVINE, C.

The plaintiff in error was convicted under an information charging him with embezzlement, in that on the 7th day of June, 1892, in the county of Butler, "he then and there being, and being then and there the agent of and for a certain incorporated company, to-wit, the Omaha Elevator Company, and the said John McAleer, being then and there not a person within the age of eighteen years and not being an apprentice, certain money belonging to the Omaha Elevator Company, of the amount and value of \$150, the property of the said Omaha Elevator Company aforesaid, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use without the assent of the said Omaha Elevator Company aforesaid, his said employer, and without the assent of any owner or owners of said money, which said money had then and there come into the possession and care of him, said John McAleer, by virtue of his said employment," etc. The attorney general, being convinced that there is error in the record, has declined to file a brief, and under the rule stated in *George v. State*, 44 Neb., 757, we would be warranted in reversing

the judgment without an examination of the record, but we think the trial court should be informed of our views upon what we deem the most serious questions in the case. Before stating these we wish to say that we have not examined the numerous assignments of error relating to rulings upon the evidence.

The eighth instruction given by the court was as follows: "If the jury find from the evidence, beyond a reasonable doubt, that the defendant, on or about the 7th day of June, 1892, in the county of Butler, the state of Nebraska, was then the agent of the Omaha Elevator Company, and the said John McAleer then and there certain money belonging to the Omaha Elevator Company of the amount of \$150, the property of the Omaha Elevator Company, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use without the assent of the Omaha Elevator Company, then you should find the defendant guilty." An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence. (*Runge v. Brown*, 23 Neb., 817; *Gilbert v. Merriam & Robertson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaid*, 26 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 297.) The instruction we have quoted purports to state all the elements necessary to a conviction. When we analyze the instruction, we find that it requires the jury to find that there was proved, first, substantially the time; second, the venue; third, that the defendant was the agent of the Omaha Elevator Company; fourth, that the money was the property of the Elevator Company; fifth, that he embezzled it and converted it to his own use; sixth, that it was done without assent of the owner. Embezzlement is a statutory offense. The information in this case was framed under section 121 of the Criminal Code, which is as follows: "If any clerk, agent, attorney-at-law, or serv-

ant of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney-at-law, agent, clerk, or servant of any incorporated company or joint stock company shall embezzle or convert to his own use, or fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use without the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action, or other valuable security, or effects whatever, belonging to any other persons, body politic or corporate, which shall come into his or her possession or care by virtue of such employment," etc. The plaintiff in error contends that this statute requires proof that the employer was an incorporated company, and that the defendant was over the age of eighteen, and not an apprentice. We do not so read the statute. Its language is that "if any clerk, agent, attorney-at-law, or servant of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney-at-law, agent, clerk, or servant of any incorporated company or joint stock company shall embezzle," etc. That is, the law applies to all officers, attorneys, agents, clerks, or servants of incorporated companies, or joint stock companies, and it applies to clerks, agents, attorneys-at-law, or servants of private persons or copartnerships, provided they be not within the age of eighteen years, and not apprentices. This information charges that the elevator company is an incorporated company, and that fact, if proved, would render it unnecessary to prove that the defendant was not within the age of eighteen, and not an apprentice. On the other hand, the information charges that the defendant was not within the age of eighteen, and was not an apprentice; but this allegation might not relieve the state of the necessity of proving the character of the employer as averred. Therefore, in order to establish the offense, in addition to the elements stated in

the instruction quoted, it was at least necessary to show that the elevator company was an incorporated company, otherwise under any information it would become necessary to show that the defendant was not within the age of eighteen, and was not an apprentice. In any view the instruction omits some essential element of the offense, and is, therefore, erroneous.

In the examination of this instruction we do not consider whether the evidence was sufficient to show the corporate capacity of the elevator company, or even whether it was shown without contradiction, because in a criminal case it is incumbent upon the state on a plea of not guilty to establish every essential element of the charge beyond a reasonable doubt, and the court cannot assume that any such element has been so proved unless admitted by the defendant or treated by him as proved. (*Heldt v. State*, 20 Neb., 492; *Hill v. State*, 42 Neb., 503.) The instruction also omits the element that the money must have come into the defendant's possession or care by virtue of his employment, as the statute requires. It is true that the instruction tells the jury that it must find that the defendant embezzled the money, and this defect might have been cured by a correct definition of embezzlement under our statute. But the only definition given was in the ninth instruction, as follows: "Embezzlement is the fraudulently removing and secreting of money or personal property with which the party has been entrusted for the purpose of applying it to his own use." In *Chaplin v. Lee*, 18 Neb., 440, embezzlement was defined as "the act of fraudulently appropriating to one's own use what is entrusted to the party's care and management;" but, as we have stated, embezzlement is an offense created by statute. It has no common law signification. We must look to our statute to ascertain what here constitutes embezzlement, and while the statute uses the word "embezzle," and thereby refers us to the ordinary acceptance of the term for its definition, it at the

same time expressly requires that the thing embezzled must have come into the possession or care of the servant by virtue of his employment. It is not sufficient that he has been entrusted with it, but it must have been in his capacity as a servant—"by virtue of such employment."

It may be well in this connection to call attention to another feature of this ninth instruction. By it the jury is told that it is embezzlement to fraudulently remove and secrete money or personal property with which the party has been entrusted for the purpose of applying it to his own use, while in *Chaplin v. Lee, supra*, it is held that it is essential to constitute the crime that the owner should be deprived of the property by adverse use or holding. That is, the secreting of money with intention to convert it is not embezzlement; there must be an actual appropriation thereof. Under an information charging an actual embezzlement, proof of secreting with intent to embezzle is insufficient.

REVERSED AND REMANDED.

HERMAN DIERS V. JAMES P. MALLON ET AL.

FILED OCTOBER 15, 1895. No. 5815.

1. **Sheriffs and Constables: ARREST AND DETENTION WITHOUT WARRANT.** In the absence of any statutory power or authority a sheriff, constable, or other peace officer may arrest, without process, a person whom he has reasonable cause to believe guilty of a felony, and detain him a reasonable time until a warrant can be procured. Such officer is justified in arresting without a warrant for a felony, even though he has no personal knowledge of the guilt of the accused, if the officer in good faith acted upon information received from others upon whom he had reason to, and did, rely, although it should subsequently turn out that the one so arrested was not guilty.

Diers v. Mallon.

2. ———: ———: REASONABLE GROUNDS: BY WHOM DETERMINED.

When the testimony is conflicting, the question whether the officer had reasonable ground for believing that the person arrested had committed a felony is for the jury under proper instructions. But where the facts are conceded or undisputed, probable cause is a question of law for the court to determine.

3. ———: ———: ———. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.

4. **False Imprisonment: REASONABLENESS OF DETENTION: BY WHOM DETERMINED.** In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court.

5. ———: EVIDENCE OF PLAINTIFF'S GOOD CHARACTER. Evidence to establish the previous good character of the plaintiff in a suit for false imprisonment is inadmissible, where no attempt has been made to assail it.

6. **Instructions: RECORD FOR REVIEW.** The instructions given and refused not considered, because of the insufficiency of the assignments relating thereto both in the motion for a new trial and the petition in error.

7. **False Arrest and Imprisonment: VERDICT FOR DEFENDANTS: EVIDENCE.** Evidence considered, and held sufficient to justify a verdict for the defendants.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J.

The opinion contains a statement of the case.

C. Hollenbeck and *N. H. Bell*, for plaintiff in error:

The sheriff is liable for the use of excessive force or violence whether inflicted wantonly or otherwise. (*Krug v. Ward*, 77 Ill., 603; *Blythe v. Tompkins*, 2 Abb. Pr. [N.

Diers v. Mallon.

Y.], 468; *Parsons v. Harper*, 16 Gratt. [Va.], 64; *Foxhall v. Barnett*, 22 Eng. L. Eq., 179.)

Plaintiff's character is in issue, and if known to defendant, may be proved to show a want of probable cause. (*Israel v. Brooks*, 23 Ill., 575; *Hirsch v. Feeney*, 83 Ill., 548; *McIntire v. Levering*, 148 Mass., 546.)

W. H. Munger and Frick & Dolezal, contra, cited: *Rohan v. Sawin*, 5 Cush. [Mass.], 281; *Doering v. State*, 49 Ind., 56; *Rafferty v. People*, 69 Ill., 111; *Pepper v. Mayes*, 81 Ky., 674; 7 Am. & Eng. Ency. Law, 675; 2 Thompson, Trials, secs. 1559, 1560; *Firestone v. Rice*, 38 N. W. Rep. [Mich.], 885; *Cochran v. Toher*, 14 Minn., 385; *Fire Association v. Flemming*, 3 S. E. Rep. [Ga.], 420.

NORVAL, C. J.

This was an action for false arrest and imprisonment by Herman Diers against James P. Mallon, as principal, E. William and others, as sureties on the official bond of said Mallon, as sheriff of the county of Dodge. There was a verdict for the defendants, a new trial was denied, and judgment was entered upon the verdict. Plaintiff prosecutes error.

The facts in the case, as disclosed by the record before us, are, in substance, as follows: On the 10th day of December, 1889, one Carlos F. Pulsifer was murdered near the village of Crowell, in Dodge county. A day or two later the defendant sheriff arrested and held in his custody in the jail of said county, Charles Shepherd and Christian Furst upon the charge of having committed said murder. During said imprisonment, and on the 13th day of said month of December, the sheriff was present at a conversation had between said Shepherd and the attorney of the latter, T. M. Franse, Esq., in which the former stated to the latter, in substance and effect, that the plaintiff Diers

Diers v. Mallon.

had hired him, Shepherd, to kill and murder said Pulsifer, which statement said Shepherd reiterated in the presence and hearing of the officer; that at the same time Mr. Franse said he was not surprised, or words to that effect; that he knew that some one was behind it, and further, Pulsifer had stated during his lifetime that if he was ever murdered it would be by Diers; that Mr. Franse also stated that Diers, the plaintiff, was a bad man, by which the sheriff understood that plaintiff was a vicious man, and one difficult to handle. On the 14th day of December Mr. Mallon took the train for Norfolk, and while going he had a conversation with Judge Crawford, of West Point, with whom he was acquainted, regarding the murder, and of whom he made inquiry in regard to the reported statement above referred to claimed to have been made by Pulsifer in his lifetime, and Judge Crawford informed the sheriff that Mr. Romberg had stated in West Point that Pulsifer had made the statement, "if he was killed, that Diers would be the one that would murder him;" that the judge also informed him that years before there were a number of incendiary fires at West Point, and that Diers was strongly suspicioned as being the perpetrator of the crimes; that it was getting pretty hot for Diers, and an attorney was consulted, who advised Diers to enlist in the army to prevent his being prosecuted, and he thereupon did so. On the information thus received from Shepherd, Franse, and Crawford, the defendant Mallon, on returning home from Norfolk, on Sunday, December 15, without any warrant, arrested Diers on the train for being implicated in the murder of Pulsifer; that plaintiff, upon being told that he was charged with murder, inquired of the sheriff, "Is it murder, or knowing of murder?" After the arrest of Diers he was handcuffed and in that condition brought to Fremont on the cars, and from the depot he was taken in a carriage to the jail, where he was placed and confined in one of the bedrooms in the living apartment of the jail

until December 19. Within an hour after reaching Fremont, which was on Sunday, the sheriff went to Mr. Loomis, the county attorney, told him of the arrest, detailed the circumstances to him, and asked that a complaint at once be filed. Mr. Loomis agreed to do so. The next morning, and several times during Monday, the sheriff saw the county attorney about it, and on Tuesday, December 17, a complaint was duly filed with the county judge charging the plaintiff with murder, upon which a warrant was issued, and by agreement of the parties the hearing was postponed until the 19th day of December, on which day an examination was had upon the complaint, which resulted in Diers being discharged by the county judge. It is further disclosed by the testimony adduced on the trial of this cause that the examination before the county judge was not had at an earlier date owing to the fact that the witnesses lived at so great a distance from Fremont that their attendance could not sooner be obtained; that the sheriff, at the time of the making of the arrest, believed to be true the information received from the different sources relating to Diers being implicated in the murder, and that Mr. Mallon in arresting and detaining Diers acted in the utmost good faith.

The ninth assignment of error, which is the first one discussed in the brief of counsel for plaintiff, is based upon the holding by the court as a matter of law that Mallon had probable cause for making the arrest and in withholding that question from the jury. The point is raised by the fourth instruction given, which reads as follows:

"4. The jury are instructed the evidence in this case shows that the defendant Mallon, at the time he made the arrest complained of, had reasonable and probable cause to suspect that the plaintiff was guilty of procuring the alleged murder to be committed, although as a matter of fact the plaintiff was innocent of that charge. The only questions then left for the jury to determine is: First—Did the defendant Mallon, in keeping the plaintiff in custody, use

Diers v. Mallon.

more force and violence than was reasonably necessary to safely keep and retain him in custody? In other words, is the defendant Mallon guilty of an assault and battery upon the person of the plaintiff Diers? Second—What, if any, damages has the plaintiff suffered by reason of such assault and battery?"

That Pulsifer was murdered is not questioned. The plaintiff was arrested for being implicated in the crime, by the defendant Mallon, without any warrant therefor having been issued. The authority of a sheriff, constable, or peace officer, in the absence of any express statutory provision to arrest without process upon reasonable suspicion one who is charged with the commission of a felony, and detain him for a reasonable time until a warrant can be procured is most fully established by the adjudicated cases. (*Rohan v. Sawin*, 5 Cush. [Mass.], 281; *Wade v. Chaffee*, 8 R. I., 224; *Beckwith v. Philby*, 6 Barn. & Cress. [Eng.], 635; *Doering v. State*, 49 Ind., 56; *Davis v. Russell*, 5 Bing. [Eng.], 354; *Holley v. Mix*, 3 Wend. [N. Y.], 350; *Eanes v. State*, 6 Humph. [Tenn.], 53; *Burns v. Erben*, 40 N. Y., 463; *Firestone v. Rice*, 71 Mich., 377; *Filer v. Smith*, 96 Mich., 347; *Marsh v. Smith*, 49 Ill., 396; *Shanley v. Wells*, 71 Ill., 78; *Simmerman v. State*, 16 Neb., 615; 7 Am. & Eng. Ency. Law, 675, and cases cited; Cooley, Torts [2d ed.], 202.) Judge Cooley, in his valuable treatise on Torts, after discussing the liability of a private person for arresting one on suspicion of crime, observes: "A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief he will be excused, even though it appear afterwards that in fact no felony had been committed." The reason of the rule is stated by Dewey, J., in *Rohan v. Sawin*, *supra*, in the following apt language: "It has been sometimes contended that an arrest of this character, without a warrant, was a violation of the great fundamental

principles of our national and state constitutions forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions, doubtless, had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon complaint made under oath. They do not conflict with the authority of constables or other peace officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety and the due apprehension of criminals charged with heinous offenses imperiously require that such arrests be made without warrant by officers of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested, and the arrest can only be justified by proving such guilt. But as to constables, and other peace officers, acting officially, the law clothes them with greater authority [than private persons], and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party, to await further proceedings under a complaint on oath and a warrant thereon."

Counsel for plaintiff insist that the question whether the sheriff had reasonable or probable ground for believing that plaintiff procured the murder to be committed should have been submitted to the jury, and, therefore, the court erred in not submitting to the jury the question to pass upon. If there was any conflict in the testimony upon the subject, then we would agree with counsel that it would have been reversible error for the court to withdraw the question of probable cause from the jury. Where the facts are in dispute, the question of reasonable ground for believing that the person arrested without process has com-

Diers v. Mallon.

mitted, or is implicated in, a felony is for the jury under proper instructions. Such, undoubtedly, is the general rule. But when the facts are conceded or undisputed, as is the case here, the rule is that probable cause is a question of law for the court. A number of authorities may be cited in support of this doctrine: *Turner v. O'Brien*, 5 Neb., 542; *Ross v. Langworthy*, 13 Neb., 495; *Boyd v. Cross*, 35 Md., 194; *Burns v. Erben*, 40 N. Y., 463; *Hamilton v. Smith*, 39 Mich., 222; *Huntington v. Gault*, 81 Mich., 155; *Perry v. Sulier*, 92 Mich., 72, 52 N. W., 801; *White v. Queen*, 55 N. W. Rep. [Mich.], 843; *Filer v. Smith*, 55 N. W. Rep. [Mich.], 999.

Did Mallon have reasonable or probable cause for arresting the plaintiff? In determining this point it is important to keep in mind the meaning of "probable cause." We know of no clearer definition of that term than the one given by the court of appeals of Maryland in *Johns v. Marsh*, 9 The Reporter [Md.], 143, in the following language: "Probable cause, according to the definition adopted by this court, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. (*Boyd v. Cross*, 35 Md., 197; *Cooper v. Utterbach*, 37 Md., 282.) It is very true, probable cause does not depend on the actual state of the case in point of fact as it may turn out upon legal investigation. It is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion." Applying the foregoing to the case under consideration, did the trial court wrongfully determine, as a matter of law, that the sheriff had probable ground for making the arrest? We are firmly

convinced that the question must be answered in the negative. The uncontradicted facts and circumstances under which the officer acted, as disclosed by this record, were of such a character that any reasonable or prudent person, divested of passion or prejudice, would have fairly suspected and believed that plaintiff was implicated in the murder of Pulsifer. Prior to the arrest, as already stated, one of the murderers, then in the custody of the sheriff, and in his presence and hearing, asserted that plaintiff procured him to commit the crime. But this is not all. The sheriff, upon making inquiry of Mr. Franse and Judge Crawford, both reliable and credible persons, and with whom he was acquainted, had ascertained from them that Pulsifer had made the statement concerning Diers already mentioned, which tended to strengthen his belief in the truthfulness of the information imparted by Shepherd. In making the arrest Mallon was not prompted to do so by mere idle rumor, but acted in the utmost good faith upon information received from others, upon which he had reason to and did rely, and any cautious, prudent person, under the circumstances, would have so acted. We are constrained to hold that the officer was not required to make further inquiry regarding the truth of the charge imputed to the plaintiff, and that under this record the trial court was fully justified in not submitting to the jury for their determination the question whether the sheriff had reasonable or probable cause for believing that the plaintiff was guilty of the crime of murder.

What we have said disposes of the assignment of error based upon the refusal of the court below to permit plaintiff to prove that the relations existing between him and Pulsifer were the most friendly and confidential, and were so known in the community where they resided. Had this testimony been received it would not have shown want of probable cause. Mallon was not bound to show that Diers was in fact guilty, nor was he required to make inquiries of

Diers v. Mallon.

his neighbors concerning plaintiff's character and the relations he sustained towards deceased. All that the law demanded of him was that he act in good faith upon information of such a character as to raise in his mind a reasonable ground to suspect that the plaintiff was implicated in a felony. This, as we have seen, was fully established upon the trial.

It is argued that the court erred in holding that the plaintiff was detained an unreasonable length of time before he was taken before the county court for examination,—in other words, that the question of unreasonable detention should have been submitted to the consideration of the jury. Had the evidence been conflicting upon that branch of the case, then it would have been for the jury to pass upon. But there is not a particle of conflict in the testimony as to the length of time, or the circumstances under which the plaintiff was held; therefore the reasonableness of the detention was a question of law for the court. This is the rule laid down in 2 Thompson, Trials, sections 1559 to 1561, and is believed to be sound. See *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y., 553, where the court, in considering the same question, say: "When the testimony is conflicting and the facts are unsettled, the jury are to decide, under the instructions of the court, as to the law. When there is no dispute as to the facts, the question is purely one of law, and the court should decide it." In view of the facts already detailed we do not think plaintiff was held an unreasonable length of time, and the court did not err in so deciding. It was Sunday that the arrest was made, and although, as contended by plaintiff, the Code confers upon magistrates in criminal proceedings the power to hold an examination upon the first day of the week, they are not required so to do. (*Pepper v. Mayes*, 81 Ky., 674.) Therefore Mallon was not derelict of duty in not filing a complaint causing a warrant to be issued, and taking the plaintiff before a magistrate on the day of the arrest. As

stated elsewhere, the sheriff, immediately after arriving with the prisoner in Fremont, and frequently during the following day, called the attention of the prosecuting officer of the county to the matter, detailing to him the facts within his possession, and requested that he prepare a complaint and have a warrant issued, which the prosecutor promised to do. Upon this assurance Mallon had a right to rely, and was not required to procure another attorney to institute the prosecution. On Tuesday the complaint was filed, but by consent of the counsel representing Mr. Diers the examination was deferred until Thursday. It appears that the attendance of witnesses could not be sooner procured. Plaintiff was given as speedy a hearing as the circumstances would permit, and the court did not err in determining that the detention was not unreasonable.

The eleventh assignment of error is as follows: "The court erred in refusing to give to the jury instructions numbered 1, 2, 3, 4, and 5 as requested by plaintiff." These five requests to charge read thus:

"1. An officer should not receive every idle rumor, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest upon the information of another.

"2. Mallon had no right to put irons upon plaintiff unless it was necessary for his safe keeping, and if it was not necessary for his safe keeping, then defendants are liable.

"3. The detention of plaintiff by defendant, without a warrant, under arrest until Tuesday following his arrest, was detaining him an unreasonable time, and renders the defendants liable.

"4. It was the duty of the defendant Mallon, when he arrested plaintiff, to procure a warrant as soon as he reasonably could, and if he did not so procure a warrant, he is guilty of false imprisonment for such length of time as plaintiff was so held without his consent.

"5. If you find from the evidence that plaintiff was sub-

jected to treatment unnecessarily severe after his arrest, the defendants are liable for such damages as plaintiff has suffered by reason of such unnecessary severity."

While it is urged the law of the case is correctly set forth in these requests, it is conceded that if the trial court was right in withholding from the jury the question of probable cause and that of the reasonableness or unreasonableness of the detention of plaintiff after his arrest, that the first, third, and fourth of these requests were rightly refused. We quite agree with the counsel in this, and as we have reached the conclusion that both the question of the probable cause for making the arrest and the reasonableness of the detention of the plaintiff were questions of law for the court, and that it properly determined them, it follows that no error was committed in not giving the said first, third, and fourth instructions. The refusing of plaintiff's requests copied above having been assigned as error *en masse*, both in the petition in error and motion for a new trial, and a portion of them having been rightly refused, under a rule established by an unbroken line of decisions the remaining requests to charge will not be considered by us.

What we have just stated applies with equal force to the twelfth assignment, which is predicated upon the giving of the fourth, fifth, sixth, seventh, and eighth instructions. The giving of these instructions is assigned as error in the motion for a new trial in this language:

"5. The court erred in giving to the jury instructions numbers 4, 5, 6, 7, and 8, and all other instructions excepted to by the plaintiff."

One or more of these instructions, and especially the eighth, on the measure of damages, stated the law applicable to the facts proved, hence the entire assignment will not be further considered.

Another contention is that the court erred in not permitting the plaintiff to introduce evidence of his good char-

acter. There is some conflict in the decisions as to the competency of evidence to establish the previous good reputation of the plaintiff in an action for false imprisonment, where, as in this case, his general reputation has not been assailed. We shall not at this time attempt a review of the authorities. The better rule is that where no attempt has been made to show the plaintiff's reputation to be bad, he must rely upon the general presumption of good character. (*Cochran v. Toker*, 14 Minn., 385; *Fire Association v. Fleming*, 3 S. E. Rep. [Ga.], 420.) This certainly is the correct principle, where, as in the case before us, the defendant did not live in the same neighborhood with the plaintiff, and had but little acquaintance with him prior to the arrest. But it is said that Mallon had abundant time, after receiving the first information implicating plaintiff, and prior to the arrest, to make inquiries of the neighbors of Diers as to his habits, standing, and character, and that he was negligent in failing so to do. We do not think so. An atrocious crime had been perpetrated, and it was important that the officer should act promptly to prevent a possible escape of the person accused. He was justified in acting upon reliable information in his possession, which was sufficient to raise an honest belief in the mind of a prudent person of the probable guilt of the plaintiff. He was not required to make further investigation to ascertain if the accused was not in fact innocent.

It is argued that the verdict is not sustained by sufficient evidence and is contrary to law. The basis of this contention is the treatment which the plaintiff received at the hands of the sheriff at the time he was taken into custody and during his imprisonment. In *Atwood v. Atwater*, 43 Neb., 147, which was an action for false imprisonment, we had under consideration the liability of a police officer for making an arrest under a warrant, and it was held that if such officer acts oppressively in the execution of the process placed in his hands and unnecessarily abuses the person

Diers v. Mallon.

arrested, he must answer therefor in damages. The rule is not different where the arrest is made without process. Was the plaintiff treated unnecessarily severe? It is undisputed that the sheriff put handcuffs upon him immediately upon his arrest, but the evidence is conflicting as to the length of time they remained on. The plaintiff's testimony is to the effect that they were not removed until Thursday after he was taken into custody, while the evidence on behalf of the defendants tends to show that the irons were removed for a short period a number of times prior to Tuesday, on which date they were taken off and not put on again, and that plaintiff at the time made no complaint about his treatment. It was also shown that plaintiff's feet were manacled, but here again there is a conflict in the proofs adduced as to how long the fetters were so left upon them. It is argued that there was no necessity for placing the plaintiff in irons, since he offered no resistance and at no time made any attempt to escape. It is said: "From all that appears to the contrary, the sheriff might have written to the plaintiff and he would have come in and submitted quietly to arrest and might have been tied to a tree in the jail yard with woolen yarn, in the safe assurance that he would be found there when he was wanted for examination." This may be true, and yet the sheriff was not at the time aware of it. He did not know that the plaintiff would not attempt to escape. Diers was charged with a heinous crime, which caused considerable excitement and commotion among the people of the county, and the sheriff had been informed that the plaintiff was a bad man. The evidence bearing upon the sheriff's treatment was submitted to the jury under these instructions:

"While an officer is bound to treat his prisoners with such kindness as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in ar-

rest for felony or offenses of great magnitude. His action in this regard is to be considered in the light of all the facts and circumstances proved by the evidence on the trial of the case, bearing upon the question of what means are reasonably necessary to keep the prisoner safe and secure.

"The jury are instructed that in order to constitute an assault and battery in this case it is necessary that the jury, from the evidence, find that the defendant Mallon had, at the time and place complained of, unlawfully used force and violence upon the person of the plaintiff in excess of what was reasonable and necessary under the circumstances to safely detain and secure the safe-keeping of the plaintiff. If the jury from the evidence find there was no excess of force or violence used by the defendant beyond what was sensibly necessary to safely keep the plaintiff, then the defendant would not be liable in this action; but if the jury from the evidence believe that the defendant Mallon did use any excess of force or violence beyond what was reasonably necessary to safely keep the plaintiff, then the defendant would be liable to the plaintiff for any injury or damage suffered by the plaintiff by reason alone and rising solely out of the use of such excessive force or violence wantonly or excessively inflicted."

Under these instructions, which are substantially the same as those approved by the supreme court of Michigan in *Firestone v. Rice*, 71 Mich., 377, the jury decided that the sheriff was justified in placing the plaintiff in irons. After a careful consideration of the evidence returned in the bill of exceptions we are satisfied that it sustains the verdict. The sheriff was not prompted to do as he did through malice or ill-will, but he acted in good faith, believing it was necessary to handcuff the plaintiff to prevent his escape. In the language of Morse, J., in *Firestone v. Rice*, *supra*: "Having reasonable cause for making the arrest, the question arises, was the officer justified in handcuffing the parties? We think the rule laid down by the circuit

Diers v. Mallon.

judge a proper one. There must be some discretion reposed in a sheriff, or other officer, making an arrest for a felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; and this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person. It is not necessary, as claimed by the plaintiff's counsel, that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing at the time of the arrest in the way of attempting to escape, or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons, as it seems to me there were in this case, why such extreme measures should be resorted to in order to secure and safely lodge the prisoner. * * *

That it turned out afterwards that the plaintiff was innocent of any offense, was neither a 'slippery' or desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape, cannot alter the rule which saves the sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable. The arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities oftentimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime. An officer is bound to act humanely, and cannot lightly and without reason either arrest or harshly treat a supposed offender, be he innocent or guilty. * * *

The sheriff cannot stop,

State v. Thayer.

when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable."

After a careful consideration of the record and the able arguments of counsel, we are convinced that plaintiff has had a fair and impartial trial, and there being no reversible error committed by the trial court, the judgment is

AFFIRMED.

Post, J., not sitting.

STATE OF NEBRASKA, EX REL. BERMUDA BEER, V.
JOHN M. THAYER, GOVERNOR.

FILED OCTOBER 15, 1895. No. 4063.

Contracts: SCHOOL LANDS: APPRAISEMENT. The decision in *State v. McPeak*, 31 Neb., 139, followed.

ORIGINAL application for *mandamus*.

Darnall & Babcock and *H. M. Grimes*, for relator.

William Leese, Attorney General, *contra*.

NORVAL, C. J.

The controlling facts in this case are the same as in *State v. McPeak*, 31 Neb., 139, and following the decision

Einspahr v. Smith.

therein, a peremptory writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

JOHN EINSPAHR, APPELLEE, V. ALFRED H. SMITH ET AL., APPELLANTS.

FILED OCTOBER 15, 1895. No. 4995.

1. **Appeal: FINAL ORDER.** An appeal cannot be prosecuted from the district court to this court until after a final judgment or final order has been entered in the action.
2. **Final Order: TEMPORARY INJUNCTION: APPEAL.** An order continuing in force during the pleasure of the court a temporary injunction theretofore issued is not final, and is, therefore, not appealable.
3. ———: **APPEAL.** *Horn v. Queen*, 5 Neb., 472, distinguished.

APPEAL from the district court of Adams county. Heard below before GASLIN, J.

Sedgwick & Power, for appellants.

Tibbets, Morey & Ferris, contra.

NORVAL, C. J.

This was an action brought by the appellee in the district court of Adams county to vacate and set aside a certain judgment obtained against him in the county court of York county, and to restrain the levying of an execution issued upon a transcript of said judgment filed in the district court of the first named county. A temporary injunction was granted at the commencement of the suit restraining the defendant Crane, as sheriff, from levying the execution then in his hands, the defendant Spicer, clerk of

the district court, from issuing another execution upon said judgment, and the other defendants from transferring, or assigning, or attempting to enforce, said judgment. Issues were joined by the defendants filing answers to the petition and plaintiff replying to the answers. For our purposes it will be unnecessary to set out copies of the pleadings, or even give the substance thereof. After the hearing, the court entered the following findings and decision upon the journal:

"And now on this 26th day of March, 1891, the same being one of the days of the regular March, 1891, term of said court, this cause came on to be heard, the plaintiff and all of the defendants appearing by counsel. Thereupon this cause comes on for hearing upon the petition of the plaintiff, the answers of the defendants, and the reply of the plaintiff. A jury being waived, the issues being joined, testimony was thereupon introduced, and the court, after hearing said testimony, and after consideration of the case, and being fully advised in the premises, finds that the plaintiff never signed the note upon which the judgment in controversy was rendered; that at the time the summons was served upon this plaintiff in the action in which said judgment was obtained, plaintiff was seriously afflicted with dropsy and heart disease and was in danger and expectation of immediate death, and was thereby incapacitated from giving attention to said action. It is therefore ordered, adjudged, and decreed by the court that, pending further consideration of this case by the court, and pending further proceedings therein, the temporary injunction heretofore granted in this action be continued until otherwise ordered by this court."

It is from the foregoing order that the defendants appeal. We do not regard the order appealable. Under our statute neither the decision of the district court, nor the finding made by it, can be reviewed until there has been rendered a judgment or final order in the case. (*Seven Valleys Bank v.*

Einspahr v. Smith.

Smith, 43 Neb., 237, and cases there cited; *Johnson v. Parrotte*, 46 Neb., 51.) Section 581 of the Code defines a final order as follows: "An order affecting a substantial right in an action when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." It is obvious that the effect of the order sought to be reviewed is not to determine the action and prevent a judgment, nor was it made in a special proceeding, nor in a summary application after judgment; therefore the order continuing the temporary injunction in force for an indefinite time is not a final order within any of the statutory definitions of that term, and is not appealable. True, the district court has made findings of fact in the case, and it may have been the intention of the trial judge to render a final decree thereon, but there was a total failure so to do. There is nothing to prevent the court below from dissolving the injunction or to make it perpetual. Had the district court perpetually enjoined the judgment upon which the execution was issued, such decree would be a final judgment and reviewable on appeal (*Rickards v. Coon*, 13 Neb., 419); but such is not this case. The order complained of is interlocutory merely, and not appealable under the provisions of our statute. The court below has not as yet vacated the judgment upon which the execution issued, nor perpetually restrained the collection thereof. No disposition of the cause upon the merits has been made, but the suit, so far as this record discloses, is still pending in the court below. The conclusion reached does not conflict with *Horn v. Queen*, 5 Neb., 472, since the record in that case shows that a final judgment was entered in the district court setting aside a judgment and granting the plaintiff a new trial in an action before a justice of the peace, although the journal entry of the judg-

Viergutz v. Aultman.

ment appealed from was not very formal. Here there has been no final disposition of the case by the district court or final judgment entered therein. The appeal is therefore dismissed.

APPEAL DISMISSED.

WILHELM VIERGUTZ ET AL. V. AULTMAN, MILLER &
COMPANY ET AL.

FILED OCTOBER 15, 1895. No. 6443.

Estoppel: LIEN OF JUDGMENT: REPRESENTATION AS TO VALIDITY. One S., the owner of land against which a judgment is an apparent lien, represented to M. that the judgment is a valid lien and that he would pay the amount due thereon. M., relying upon such representations, purchased the judgment. *Held*, That S. is estopped from asserting against M. that the judgment is not a lien.

ERROR from the district court of Wayne county. Tried below before JACKSON, J.

George N. Beels and W. F. Schoregge, for plaintiffs in error, cited: *Ferguson v. Kumler*, 25 Minn., 184; *Giles v. Miller*, 36 Neb., 346.

Mapes & Licey, contra, cited: *Harrington v. Latta*, 23 Neb., 84; *Grant v. Cropsey*, 8 Neb., 205; *Newman v. Mueller*, 16 Neb., 523; *Betts v. Sims*, 25 Neb., 166; *St. Louis Wrought Iron Range Co. v. Meyer*, 31 Neb., 543.

NORVAL, C. J.

The object of this proceeding is to obtain a review of an order of the district court confirming the sale of a quarter section of land sold upon execution. The record discloses that on the 8th day of December, 1890, Aultman,

Miller & Co. recovered a judgment in the county court of Wayne county against Wielhelm Viergutz in the sum of \$185.62, which was subsequently transcribed to the district court of the county for the purpose of making the same a lien upon the real estate of the debtor in the county. At the date of the filing of the transcript Viergutz owned 160 acres of land in the county, upon which he resided with his family as a homestead, and continued so to do until about December 28, 1891, when he sold and conveyed the tract to Julius A. Sanders, one of the plaintiffs in error herein, for \$2,500. From said sum the purchaser deducted the amount of all mortgage liens and taxes against the property and the sum due upon the judgment aforesaid. The remainder of the purchase price was paid to the vendor. In August, 1892, Aultman, Miller & Co. assigned the judgment to Horace McBride, one of the defendants in error, who subsequently caused an execution to be issued on said transcribed judgment by the clerk of the district court, which was levied by the sheriff upon the quartersection in controversy. The land was duly appraised and advertised, and was sold to D. C. Main. Prior to the sale Viergutz served a notice in writing upon the sheriff, claiming the land exempt as a homestead, and, upon the return of the execution into court, Viergutz and Sanders objected to the confirmation on the ground that the land was not liable to sale upon execution, because it was a homestead when the judgment was obtained and filed and thereafter until the conveyance to Sanders was made. The objection was overruled and the sale confirmed. No question was made in the lower court, nor is any point here urged, as to the regularity of the sale, but it is insisted that the judgment was not a lien upon the land. The evidence fully establishes that the property was at all times the homestead of Viergutz so long as he remained the owner thereof, and that his interest therein above the mortgage liens was much less than \$2,000. Therefore, the judgment

was not a lien upon the property. (*Hoy v. Anderson*, 39 Neb., 386.) Evidence was introduced tending to show that when the conveyance was made to Sanders the amount due upon the judgment was deducted from the consideration and that the purchaser assumed the payment of the judgment. The court found that there was no agreement between Viergutz and Sanders whereby the latter should pay the judgment, and, we think, there is sufficient evidence in the record before us to sustain the finding.

It is argued by counsel for defendants in error that Sanders, the vendee of Viergutz, is estopped from now asserting that the judgment is not a lien upon the land, as against Horace McBride, the purchaser and owner of the judgment. This position is unassailable. The proofs are uncontradicted to the effect that in August, 1892, Aultman, Miller & Co. were threatening to enforce the collection of the judgment against Sanders, and the latter, being then unable to pay it, represented to McBride that he had bought the land and that the judgment was a lien thereon, and he would pay it. Upon these representations McBride was induced to purchase the judgment, he agreeing to extend the time for payment several months. We are constrained to hold that Sanders is estopped from claiming that the judgment was not a valid lien upon the land, although as a matter of fact it was not a lien. (*Kruger v. Adams & French Harvester Co.*, 9 Neb., 526; *Koch v. Losch*, 31 Neb., 625; *Grant v. Cropsey*, 8 Neb., 205; *Newman v. Mueller*, 16 Neb., 523.) The facts constituting the estoppel are well pleaded, and the evidence supports the findings of the court.

Complaint is made in the brief of the admission of incompetent testimony. This objection is of no avail, for two reasons: First, because the point is not raised either in the motion for a new trial or in the petition in error, and second, the hearing was before the court without a jury, and in such case error in the admission of testimony is not

Whitner v. State.

alone sufficient cause for reversal of a judgment by a reviewing court. This has been too often held by this court to require the citation of authorities in support thereof. The order confirming the sale is

AFFIRMED.

CORA WHITNER V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 6539.

1. **Criminal Law: FAILURE TO TRY ACCUSED: TIME: DISCHARGE.** In construing section 391, Criminal Code, providing for the discharge of any person indicted who after having given bail shall not be brought to trial before the end of the third term of court held after the finding of the indictment, the term at which such indictment is found should be excluded.
2. ———: **VARIANCE BETWEEN INDICTMENT AND COMPLAINT: OBJECTION.** Objection on the ground that the offense charged in an indictment or information differs from that named in the complaint upon which the accused was held to answer should be made by plea in abatement and not by motion to quash.
3. ———: **DIFFERENT GRADES OF OFFENSES: INSTRUCTIONS.** The rule recognized in the second paragraph of the syllabus of *Botsch v. State*, 43 Neb., 501, is applicable to cases only in which there is an entire failure of proof to sustain the higher grade of offense charged.
4. ———: ———: ———. It is not error in a criminal prosecution to submit to the jury the question of the defendant's guilt of a higher grade of offense than that for which the conviction is had, provided there is evidence to sustain such charge, although it is possible or even probable that a verdict therefor, had one been rendered, would have been set aside as unsupported by the evidence.
5. **Assault: EVIDENCE.** Evidence held to sustain the conviction for an assault and battery.

ERROR to the district court for Colfax county. Tried below before SULLIVAN, J.

Phelps & Sabin, for plaintiff in error :

Plaintiff in error, standing *in loco parentis*, had the right to reasonably chastise the child to enforce her authority. (*Snowden v. State*, 12 Tex. App., 105; *Gormon v. State*, 42 Tex., 221; *Dowlen v. State*, 14 Tex. App., 61; 1 Am. & Eng. Ency. Law, 794.)

In addition to the general presumption of innocence, the plaintiff had in her favor the presumption that the punishment was proper and reasonable, and the burden was on prosecutrix to prove that it was excessive. (*Marlsbary v. State*, 37 N. E. Rep. [Ind.], 558; *Anderson v. State*, 2 Head [Tenn.], 455; *Lander v. Seaver*, 32 Vt., 114; *Patterson v. Nutter*, 8 East. Rep. [Me.], 652.)

The following cases were also referred to in argument: *Friederich v. People*, 35 N. E. Rep. [Ill.], 473; *Patterson v. State*, 85 Ga., 131; *Chrisman v. State*, 54 Ark., 283; *Tiffany v. Commonwealth*, 121 Pa. St., 165; *Turner v. Muskegon Circuit Judge*, 50 N. W. Rep. [Mich.], 310; *Commonwealth v. Roby*, 12 Pick. [Mass.], 496; *State v. Wheeler*, 3 Vt., 344; *State v. Kyne*, 53 N. W. Rep. [Ia.], 420; *Child v. State*, 34 Neb., 236.

A. S. Churchill, Attorney General, and *George H. Thomas*, for the state.

Post, J.

The plaintiff in error was by information in the district court for Colfax county charged with assaulting one Annie Walker, a child nine years of age, with intent, unlawfully and feloniously, to inflict great bodily injury, etc. Upon the filing of the information, to-wit, March 28, 1893, a motion to quash and for the discharge of the accused was interposed, in which the following grounds were in different forms alleged: (1.) No preliminary examination of the accused was had previous to the filing of said information.

(2.) Said information was not filed until the third regular term of court after the pretended examination before the magistrate. (3.) Said information was filed without authority of law. Said motion having been overruled, a plea of "not guilty" was entered and a trial had, resulting in a verdict finding the accused guilty of an assault and battery, upon which judgment was subsequently entered and which it is sought to reverse by means of this proceeding.

It is further shown by the record that on the 22d day of June, 1892, an information was filed by the county attorney, charging the accused with assaulting the said Annie Walker with intent to inflict great bodily injury, etc. The record of each of said informations is preceded by a recital to the effect that a preliminary examination was had before J. W. Brown, a justice of the peace for Colfax county, on the 5th day of February, 1892. It also appears that on the 14th day of March, 1893, there was filed a plea in abatement directed to the last mentioned information, which was on the same day sustained by the court, and the county attorney was thereupon permitted to file the second or amended information, upon which the accused was subsequently tried. It should, however, be mentioned that the record does not contain a transcript of the docket of the examining magistrate, or of the plea in abatement, our only information with respect to either being that imparted by the recitals above mentioned.

1. It is argued that the accused was entitled to be discharged under the provisions of sections 389, 390, and 391, Criminal Code, and that the district court accordingly erred in denying the motion to which reference has been made. Section 389 refers to cases only in which the accused has been committed to jail, and can have no application to the facts of this case, since it is affirmatively shown by the record that the accused had given bail for her appearance before the district court. It was held in *Hammond v. State*, 39 Neb., 252, that the defendant in a crimi-

nal prosecution, who has never been committed to jail or otherwise detained in custody, is not entitled to be discharged under the provisions of section 390 on the ground that he has not been brought to trial before the end of the second term of court after the finding of the indictment or the filing of the information. It was further held that in construing the provision of section 391 for the discharge of any person indicted who, after having given bail, shall not be brought to trial before the end of the third term held after the finding of the indictment, the term at which such indictment is found should be excluded. The May, 1893, term, at which the accused was convicted, was the third term after the filing of the first information, reckoned by the rule thus stated. It is clear, therefore, that she was not entitled to be discharged on account of the delay of the state, and the court did not err in denying the motion on that ground.

2. It is conceded by counsel that the plaintiff in error was given a preliminary hearing, as recited by the record of the district court, upon some charge, presumably that stated in the information, upon which she was subsequently tried. It has been held that objection on the ground that the offense charged in the indictment or information is not the one named in the complaint upon which the accused was held to answer should be made by plea in abatement and not by means of a motion to quash. (See *Cowan v. State*, 22 Neb., 519; *Hill v. State*, 42 Neb., 503.) It follows that the motion to quash was rightly overruled.

3. It is argued that there was no evidence of an intent on the part of the accused to inflict great bodily injury upon the child named in the information, and that the district court erred in submitting that question to the jury. In *Botsch v. State*, 43 Neb., 501, the information contained two counts, the first charging an assault with intent to murder, and a second charging an assault with intent to inflict great bodily injury. There being no evidence what-

Whitner v. State.

ever of the intent essential to the crime charged in the first count, it was held error to submit that question to the jury. It was said in *Murphey v. State*, 43 Neb., 34, that the term "great bodily injury," as employed in the Criminal Code, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery, and that whether a particular case is within the meaning of the statute is generally a question of fact for the jury. The accused in this case at bar is shown to have struck the child named with her hand upon the side of the head and cheek. At that time, and some four days later when examined by Dr. Long, the child's nose and one ear were swollen and inflamed, showing evident marks of violence. Some discretion is confided to the district court in the conduct of the trial, and although it is possible or even probable that a verdict for the offense charged, had such a one been rendered, would have been set aside as unsupported by the evidence, it does not follow that the submission of that question to the jury was error. In brief, the rule relied upon is applicable only to cases where, as in *Botsch v. State*, there is entire failure of proof to sustain the higher grade of offense.

4. It is contended that the accused, at the time of the alleged assault, stood *in loco parentis* to the child named, and that the striking proved was by way of punishment for disobedience and was reasonable and proper for that purpose. The question of the reasonableness of the punishment inflicted was fairly submitted to the jury, and the verdict, upon the record submitted, should not be disturbed.

AFFIRMED.

PATRICK O. HAWES V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7473.

1. **Contempt: REVIEW OF PROCEEDINGS.** Presumptions and intendments will not be indulged in order to sustain convictions for contempt of court.
2. ———: ———: **EVIDENCE.** To sustain a conviction for contempt it should appear that the language or conduct imputed to the accused is contemptuous *per se*, or, if it may be contemptuous or innocent according to the circumstances of the case, it should appear from the record to have been employed in its culpable sense.
3. **Attorneys: APPEARANCE BEFORE JUDGE: CONTEMPT.** It is the right of an attorney at law to refuse a retainer which would require his appearance before a particular judge. And a candid statement to the court or judge, in respectful language, of the reasons for such a course will not of itself sustain a conviction on the charge of contempt.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

George O. Calder, for plaintiff in error.

A. S. Churchill, *Attorney General*, for the state.

POST, J.

The plaintiff in error Patrick O. Hawes was by the district court for Douglas county adjudged guilty of contempt of court and sentenced to imprisonment in the county jail for a period of fifteen days, which judgment we are asked to reverse for reasons hereafter appearing.

In addition to the fact that the plaintiff in error is an attorney at law engaged in the practice of his profession in the courts of Douglas county, our only information regarding the conviction complained of is derived from the following record:

Hawes v. State.

“STATE OF NEBRASKA }
 v. } Charge: Contempt.
PAT. O. HAWES. }

“The said defendant Pat. O. Hawes having in open court stated that he refused to appear as counsel in the case of the State of Nebraska v. William Milbourn and Frank Jones, now pending in this court; that he would not appear in this court; that he could not be treated fair, and that this court was unfair, thereupon the said Pat. O. Hawes was by the court found guilty of contempt of court.

“It is therefore considered and adjudged by the court that the said defendant Pat. O. Hawes be taken hence by the sheriff to the jail of the said Douglas county and there confined for the period of fifteen days, from and after this 10th day of November, A. D. 1894, and that he pay the costs of these proceedings, taxed at ——— dollars, and execution is awarded therefor.”

The attorney general has declined to submit a brief in behalf of the state or otherwise defend the judgment, on the ground that it is unsupported by the findings of the district court,—a conclusion in which we fully concur. Section 669, Civil Code, provides: “Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: First—Disorderly, contemptuous, or insolent behavior towards the court or any of its officers in its presence.” The language quoted is declaratory merely of the common law. Indeed, it is doubtful if the several sections of the Code under the title “Contempt” add anything to the law of the subject, since, as has been often said, the authority to punish for contempt is inherent in all courts of record possessing common law jurisdiction, and is beyond the power of the legislature to abridge. (See *Krigel v. Bartling*, 23 Neb., 852; *Holman v. State*, 105 Ind., 513; *Rapalje*, Contempts, sec. 1, and authorities cited.) It is also true that language not in itself contemptuous may be

treated as such if used in an insulting or defiant manner. (*Holman v. State*, *supra*; *Wilson's Case*, 7 Q. B. [Eng.], 984.) Acts and conduct such as contemplated by the statute cited are known as direct contempts and may be punished summarily; but to sustain a conviction in such a case it should appear that the language or conduct imputed is *per se* contemptuous, or, if it may be contemptuous or innocent according to the sense or manner in which it is employed, the record should show it to have been used in the culpable sense. It is held by this court that proceedings for contempt are in their nature criminal and governed by the strict rules of construction applicable to criminal prosecutions. (*Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *Percival v. State*, 45 Neb., 741.) It is said in *Batchelder v. Moore*, 42 Cal., 412: "It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support." (See, also, *State v. Sweetland*, 3 S. Dak., 503, and cases cited.) Referring again to the findings of the court we are impressed with the fact that the statements imputed to the accused are *per se* neither contemptuous nor defiant, or necessarily inconsistent with the candor and courtesy which should ever characterize intercourse between the bench and bar. The circumstances which induced the statement by the accused of his refusal to appear in the criminal division of the district court do not appear, but his right to refuse a retainer imposing upon him the duty to appear in a particular branch of the court, or before any one or more of the several judges thereof, cannot be doubted; and a candid statement to the court or judge, in respectful language, of the reasons for such a cause, so far from being a contempt, is rather to be commended as tending to remove the cause for whatever differences may exist between them, by remind-

State v. Meyers.

ing court and counsel of their reciprocal rights and duties. Of course, the demeanor of the accused on the occasion in question may have been such as to fully warrant the judgment of the court, but, as we have seen, the record, which is silent upon the subject, will not be aided by presumption. It follows that the judgment complained of must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

STATE OF NEBRASKA V. WILLIAM MEYERS.

FILED OCTOBER 15, 1895. No. 7630.

1. **Witnesses: COMPETENCY: INSANITY.** One who by reason of insanity or imbecility is unable to comprehend the obligation of an oath, or to understand and intelligently answer the questions put by the court upon a *voir dire* examination, is, under the provisions of section 328, Code Civil Procedure, incompetent to testify as a witness.
2. **Rape: COMPLAINTS OF INJURY: EVIDENCE.** Evidence of the complaints of the injured person in a prosecution for rape is admissible only as corroborative of her testimony, and such complaints are not, except when made *in extremis*, admissible as independent evidence of the offense charged. (*Oleson v. State*, 11 Neb., 276.)
3. ———: ———: ———. When in such case the injured female does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify on account of imbecility or for other reasons is wholly immaterial. (*Hornbeck v. State*, 35 O. St., 277.)

EXCEPTIONS to rulings of the district court for Richardson county. Tried below before BABCOCK, J. The case was filed in the supreme court under the provisions of section 515 of the Criminal Code. *Exceptions overruled.*

C. F. Reavis and Edwin Falloon, for the exceptions.

F. Martin, contra.

POST, J.

The defendant below, William Meyers, was charged with the crime of rape alleged to have been committed upon one Elizabeth Schuler. A trial was had in the district court for Richardson county, resulting in a verdict for the accused under the direction of the court. The county attorney, having at the trial excepted to the ruling in excluding certain evidence offered in behalf of the state, has filed a petition in error in this court in order to secure a review of the judgment of acquittal based upon said verdict.

1. The said Elizabeth Schuler was produced as a witness, when objection was made to her competency on the ground that she is an imbecile and incapable of comprehending the obligation of an oath. She was examined at length by the court in order to determine the question of her competency, at the conclusion of which said objection was sustained. The state then sought to put in evidence certain declarations made by the said Elizabeth to her mother and sister shortly after the alleged assault tending to prove the commission by the accused of the crime charged; which were also excluded upon the objection of the latter, and which are the rulings now assigned as error. Section 328, Code Civil Procedure, provides: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First—Persons of unsound mind at the time of their production," etc. The competency of a person to testify as a witness concerning the matter in issue is, in the first instance, a question for the court, and whereas, in the case at bar, the presiding judge has seen and personally examined the proposed witness, all presumptions

are in favor of the correctness of his finding. As said by NORVAL, J., in *Davis v. State*, 31 Neb., 248: "The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." But the bill of exceptions clearly demonstrates the incompetency of Elizabeth Schuler and proves beyond a doubt that she was not of unsound mind merely, but an imbecile, unable to comprehend the simple preliminary questions addressed to her by the court. The objection upon that ground was accordingly well taken.

2. Did the court err in rejecting evidence of the statements above mentioned? It was shown, without objection, that the said Elizabeth left the home of her sister, Mrs. Rauscher, about 2 o'clock P. M. of the day in question, going into "the timber" to look for the cows, and returned between 4 and 5 o'clock. At that time her underclothing was torn and the condition of her person strongly indicated the commission of the wrong alleged. Indeed, so strong is the inference of the outrage from the facts in evidence that we may for the purpose of this examination assume the *corpus delicti* to have been fully established. It was held by this court in *Oleson v. State*, 11 Neb., 276, that while it is permissible to show that the prosecutrix made complaint of the alleged injury, such complaint constitutes no part of the *res gestæ*, but is a circumstance only, corroborative of the story of the prosecutrix, and that unless she is a witness in the case is wholly inadmissible. (See, also, *Mathews v. State*, 9 Neb., 337; *Hannon v. State*, 70 Wis., 448; *People v. McGee*, 1 Den. [N. Y.], 19; *Weldon v. State*, 32 Ind., 81; *Reg. v. Nichols*, 61 English C. L., 246; 1 Greenleaf, Evidence, 213.) But the identical question here involved was presented in *Hornbeck v. State*, 35 O. St., 277, in which, after a careful review of the authorities, it is held that where the female alleged to have been assaulted is, by reason of imbecility, incompetent to be sworn

Keeshan v. State.

as a witness, her declarations are inadmissible for the purpose of proving the alleged offense. In the opinion in that case by Gilmore, C. J., we find the rule thus tersely stated: "In cases of violence to the person, except when made *in extremis*, the declarations of the injured party are hearsay, and therefore inadmissible to prove the offense, and the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly established rule of evidence on the subject." The ruling of the district court must, in the light of the authorities cited, be regarded as sound. The exceptions are accordingly overruled.

EXCEPTIONS OVERRULED.

FRANK KEESHAN V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 5788.

1. **Justice of the Peace: JURISDICTION: OFFENSES.** The jurisdiction of justices of the peace is by section 18, article 6, of the constitution limited to offenses for which the penalty prescribed does not exceed three months' imprisonment in the county jail, or a fine not exceeding \$100.
2. ———: ———. The only authority of a justice of the peace under section 17, Criminal Code, previous to the amendment thereof in 1893, was that of an examining magistrate.
3. **Appeal: JURISDICTION OF TRIAL COURT.** Where the trial court is without jurisdiction of the subject-matter of an action, the appellate court will not acquire jurisdiction thereof by appeal.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

A. S. Churchill, Attorney General, and W. S. Summers, Deputy Attorney General, for the state.

POST, J.

This cause originated before a justice of the peace for Colfax county, by whom the plaintiff in error was adjudged guilty of the charge contained in the following information:

"STATE OF NEBRASKA, } ss.
COLFAX COUNTY. }

"James Gadson, being first duly sworn, upon his oath, before J. W. Brown, justice of the peace in and for said county of Colfax, state of Nebraska, deposes and says that on the 22d day of October, 1891, in the county of Colfax and state of Nebraska, one Frank Keeshan, whose first or Christian name is unknown, then and there being, did unlawfully and feloniously assault in a menacing manner, and did threaten to strike and wound him, the said Gadson, then and there being, contrary to the form of the statute," etc.

From that judgment an appeal was taken to the district court for Colfax county, where a trial was had, resulting also in a verdict and judgment against the accused, which it is sought to reverse by means of this proceeding.

It is unnecessary to notice the allegations of error which relate to the giving and refusing of instructions, for the reason, as held in *State v. Yates*, 36 Neb., 287, that the offense charged was not within the jurisdiction of the justice to try, and the objection on that ground was equally available to the accused in the district court. The provision involved in the case cited was section 30 of the Criminal Code, which, like section 17 upon which the state relies in this case, prescribes as the maximum penalty a fine not exceeding \$100, or imprisonment in the county jail not exceeding three months, or both, in the discretion of the court. It was held that the jurisdiction of police judges

and justices of the peace is by section 18, article 6, of the constitution restricted to offenses the penalty for which does not exceed three months' imprisonment, or a fine of \$100, and that their only authority under the statute then in force was that of examining magistrates. However, the legislature of 1893 amended section 17 by striking out the words "or both," thus conferring upon justices of the peace jurisdiction to punish for the offenses therein denounced. It has been settled by numerous decisions in this state that unless the court in which an action is brought has jurisdiction of the subject-matter, the appellate court will acquire none by the appeal. (*Brondberg v. Babbott*, 14 Neb., 517; *Ogilvy v. Union P. R. Co.*, 18 Neb., 638.) The question of the authority of the justice to proceed at this time as an examining magistrate is not discussed by counsel and is accordingly not determined. The judgment is reversed and the cause remanded to the district court for appropriate action therein.

REVERSED.

THOMAS O'CONNOR V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 6849.

1. **Physicians and Surgeons: STATE BOARD OF HEALTH: CERTIFICATES.** By the act of the legislature of 1891 (Session Laws, 1891, p. 280, ch. 35) to establish a state board of health and regulate the practice of medicine in the state of Nebraska it was made unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, without first having obtained and registered a certificate from the state board of health as provided in the act.
2. —: **ACT CREATING STATE BOARD OF HEALTH: INFORMATION FOR VIOLATION.** The exceptions made by section 11 of the act were not from the operation of the portion of the law which required a certificate to be obtained from the state board of health and its registration by persons practicing medicine, surgery, or

O'Connor v. State.

obstetrics. After the expiration of six months from the passage of the act the persons designated in the exceptions were as liable to prosecution for non-compliance with the law in these particulars as were any others, and the subject of the exception did not become a part of the description of the offense of non-compliance with the provisions of the act, or limit or qualify the language of the act creating such offense, nor was any negative averment in regard to the exceptions necessary in an information charging a person with practicing medicine, etc., without having complied with the provisions of the act.

3. ———: ———: ———. The decision in the case of *Gee Wo v. State*, 36 Neb., 241, overruled to the extent that it held that a negative averment in regard to the matter of the exceptions contained in section 11 of the act referred to, was necessary in the information filed in that case.
4. **Informations.** In an information it is necessary to state specifically the essential facts constituting the crime charged.
5. **Physicians and Surgeons: PRACTICE IN VIOLATION OF STATUTE: INFORMATION.** The law of 1891 regulating the practice of medicine (see Compiled Statutes, 1895, secs. 3684-3702), after providing that any person not possessing the qualifications for the practice of medicine required by its provisions, or any person who, not having complied with the requirements of its provisions, shall engage in the practice of medicine, shall be deemed guilty of a misdemeanor, further states that "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal or prescribe for or otherwise treat any physical or mental ailment of another." (Session Laws, 1891, p. 285, sec. 17, ch. 35.) *Held*, To be a definition of practicing medicine, and further, that in charging the crime of practicing medicine without having complied with the provisions of the act, there must be a statement of facts showing the doing by the accused person of one or more of the acts included within the foregoing statutory definition.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

The facts are stated in the opinion.

Charles A. Robbins, for plaintiff in error:

The information does not state an offense under the law. (*Gee Wo v. State*, 36 Neb., 241.)

The verdict of the jury and judgment of the court are not sustained by the evidence. (*People v. Phippin*, 37 N. W. Rep. [Mich.], 888.)

The act under which the information was filed is unconstitutional. (*People v. Phippin*, 37 N. W. Rep. [Mich.], 898; Constitution, United States, sec. 2, art. 4, sec. 1, art. 14; Constitution, Nebraska, secs. 1, 3, art. 1; *Taylor v. Porter*, 4 Hill [N. Y.], 147; *Poppen v. Holmes*, 44 Ill., 360; *In re Graduates*, 11 Abb. Pr. [N. Y.], 301; *In re Railroad Commissioners*, 15 Neb., 679.)

A. S. Churchill, Attorney General, *contra*, cited: *State v. Hathaway*, 21 S. W. Rep. [Mo.], 1081.

W. H. Woodward and *F. W. Collins*, also for the state.

HARRISON, J.

The plaintiff in error was tried in the district court of Lancaster county on a charge of practicing medicine in said county without first obtaining a certificate and filing the same or a copy thereof in the office of the county clerk, and was convicted and sentenced. The information was as follows:

"Be it remembered that Novia Z. Snell, county attorney in and for Lancaster county and the third judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes here in person into court at this, the February term, A. D. 1892, thereof, and for the state of Nebraska gives the court to understand and be informed that one Thomas O'Connor, late of the county aforesaid, on the 1st day of March, 1892, and thereon continuously until the 28th day of April, A. D. 1892, in said county of Lancaster and state of Nebraska aforesaid, did unlawfully practice medicine without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office

of the county clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced medicine as aforesaid.

"Second Count.—And the county attorney aforesaid, by the authority aforesaid, shows to the court by a second and further count that one Thomas O'Connor, on the 8th day of December, 1891, in the county of Lancaster and state of Nebraska, did unlawfully practice medicine without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office of the clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced medicine as aforesaid.

"Third Count.—And the county attorney aforesaid, by the authority aforesaid, shows to the court by a further and third count that one Thomas O'Connor, on the 9th day of December, 1891, and then continually until the 1st day of January, 1892, in the county of Lancaster and state of Nebraska, did unlawfully practice surgery without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office of the clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced surgery as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

There was a stipulation filed in which it was agreed that the second count of the information was to be ignored and the prosecution to rest upon the first and third counts, and if convicted the sentence was to be for the charge in but one, either the first or third of the counts of the information.

It is contended that there was no sufficient statement of an offense in the information, in that it does not negative

certain exceptions contained in a section of the statutory provisions under which the prosecution was instituted; that the exceptions referred to were of such a character as to enter into and become necessary parts of the description of the offense, and being omitted in the information, it did not state the offense; that an information precisely similar to this one, except as to names and dates, was considered and passed upon by this court in the case of *Gee Wo v. State*, 36 Neb., 241, and within the rule therein announced held not to state an offense. The doctrine stated in that case was as follows: "In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information unless the matter of such proviso enters into and becomes a part of the description of the offense or is a qualification of the language defining or creating it. Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be affected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the practice of medicine, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class." By an act of the legislature of 1891 there was established a state board of health, and it was made one of the duties of this board to see that all the provisions of the act were strictly enforced, and to grant certificates to qualified persons to engage in the practice of medicine, surgery, or obstetrics, or any of the branches thereof, on compliance with the requirements of the act and furnishing the proof of such qualifications, among which is that the applicant be a graduate of a legally chartered medical school or college in good standing and the possession of a diploma attesting such fact. Section 7 of the act is as follows: "It shall be unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches

thereof, in this state without first having obtained and registered the certificate provided for by this act; and no person shall be entitled to a certificate herein provided for unless he shall be a graduate of a legally chartered medical school or college in good standing; said qualifications to be determined by the board; *Provided, however,* That nothing in this act shall be construed to prevent physicians residing in other states from visiting patients in consultation with resident physicians who have complied herewith." Sections 9 and 10 provide what proof of qualifications shall be produced, how made, and for the issuance of the certificate and the filing of the same, or a copy thereof, with the county clerk of the county in which the party resides or intends to practice medicine. Section 11, which contains the exceptions, is as follows: "All physicians who shall be engaged in practice at the time of the passage of this act shall, within six months thereafter, present to said board their diplomas and affidavits as hereinbefore provided, or in the case of persons not graduates who were entitled to registration and practice under the act entitled 'An act to regulate the practice of medicine in the state of Nebraska,' approved March 3, 1881, on affidavit showing them to have been entitled to so register and practice and a certified transcript of their registration under said act, and upon their doing so, shall be entitled to the certificate herein provided, which they shall file with the county clerk as herein provided; *Provided,* That no one having the qualifications required in and having complied with said act of March 3, 1881, shall be liable to prosecution for failure to comply with this act until the expiration of said period of six months." Section 16, which defines unlawful practice of medicine, etc., and provides the penalty therefor, reads as follows: "Any person not possessing the qualifications for the practice of medicine, surgery, or obstetrics required by the provisions of this act, or any person who has not complied with the provisions of this act who shall engage in the

practice of medicine, surgery, or obstetrics, or any of the branches thereof, in this state shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not less than fifty (\$50) dollars nor more than three hundred (\$300) dollars, and costs of prosecution for each offense, and shall stand committed until such fine and costs are paid." By the provisions of section 7 it was made unlawful for any person to practice medicine, etc., without having first obtained and registered the certificate of the state board, and that to enable him to obtain it the applicant must be a graduate of a medical college or school legally chartered and in good standing. In section 11 certain parties were excepted from the requirements of the act in relation to their being graduates of a medical school or college, but not relieved from the necessity of obtaining a certificate and its registration. From these exactions of the law there were no exceptions. After the expiration of six months from the passing of the act it was just as necessary that the persons designated in section 11 should have procured certificates and their registration as any others. None were exempted from these duties. The act was approved March 27, 1891. Courts take judicial notice of the time of passage and approval of laws. The dates of the acts charged in the complaint in this case were more than six months from the passage of the law in question, and the prosecution was for non-compliance with its demands, for unlawfully practicing medicine without first having obtained a certificate from the state board of health and filed it, or a copy of it, in the office of the county clerk of Lancaster county. There being no persons excepted from the full operation of the act wherein it commanded that the certificate be procured and registered, the exceptions of section 11 of the act, not relieving the persons pointed out from procuring and registering a certificate, were not relevant to or a part of the description of the crime sought to be charged in the information, hence

no negative averment in regard to them was necessary in the information, and the same was true of the information in the case of *Gee Wo v. State*, 36 Neb., 241. The date of the act charged as unlawful in that case was more than six months after the passage of the act of 1891, under the provisions of which the prosecution was instituted, and the opinion in that case, inasmuch as it applied the rule announced to the information filed therein and held it insufficient for lack of a negative averment in reference to the exceptions stated in section 11 of the act of 1891, is overruled. Had the information in that case or the case at bar contained a charge of the unlawful practice of medicine, etc., without having the necessary medical educational qualifications, not being a graduate of a medical college and possessing the diploma, then the exceptions of section 11 might have been relevant and the averment of them necessary, but this we need not now, and do not, determine.

It is further urged that the information contained an insufficient statement of the crime, in that it charged the defendant with unlawfully practicing medicine, etc., on and between certain dates and did not state specifically any facts or acts constituting the crime sought to be charged. Section 17 of the act of 1891, immediately following the section declaring the practice of medicine without possessing the prescribed qualifications, or without having complied with the requirements of the law in regard to the certificate, a misdemeanor, and providing a penalty therefor, defines a practitioner as follows: "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another." It is claimed that here is a plain definition of what constituted practicing medicine, contained in the act itself, and that the information in this case, in order to sufficiently charge the commission of the crime, should have

contained specific averments of facts showing acts committed which were within the definition of practicing given in the law under which the prosecution was commenced. The information was insufficient. The pleader should not have stopped with merely saying that on a certain day the defendant unlawfully practiced medicine, but should have averred that defendant, on a day or date stated, did operate or profess to heal or prescribe for or otherwise treat a physical or mental ailment of some person; set forth facts showing that he did one or all of these acts stated in the law, for some one for a bodily or mental ailment, and failure to do this rendered the information fatally defective. In charging an assault, or an assault and battery, a larceny, or perjury, it would not be sufficient to say in the information that on a certain day the party committed an assault, or a larceny, or a perjury, with no further allegations descriptive of the crime to be alleged, but in each instance it would be necessary to aver specifically the facts constituting the crime, but no more so than in alleging the crime the pleader sought to charge in the information in the case at bar. (*State v. Carey*, 30 Pac. Rep. [Wash.], 729; *Dee v. State*, 9 So. Rep. [Miss.], 356.) "It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged, that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet." (*Lamberton v. State*, 11 O., 284.) "A complaint must charge explicitly all that is essential to constitute the offense." (*Smith v. State*, 21 Neb., 552; *Rakes v. People*, 2 Neb., 157.) It follows that the judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

MICHAEL MCMAHON V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7102.

1. **Criminal Law: ARGUMENT: MISCONDUCT OF ATTORNEY: HARMLESS ERROR.** Alleged misconduct of the attorney for the state by use of improper language during his argument to the jury, *held*, when viewed in connection with the evidence and all facts and circumstances of the case, not prejudicial to the rights of the defendant.
2. ———: **MISCONDUCT OF JURORS: EVIDENCE: REVIEW.** Where the evidence as to the alleged misconduct of jurors is conflicting, the finding of the trial court thereupon will not be disturbed.
3. **Burglary: CONVICTION: EVIDENCE.** Evidence in respect to the element of intent *held* sufficient to sustain the finding and verdict of the jury.

ERROR to the district court for Merrick county. Tried below before SULLIVAN, J.

John Patterson, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

HARRISON, J.

The plaintiff in error was tried in the district court of Merrick county on a charge of burglary and was convicted and sentenced, and error in the proceedings is alleged.

It is first argued that there was misconduct of the prosecuting attorney during the trial of the cause, which entitles the plaintiff in error to a reversal of the judgment. During the course of his argument to the jury the prosecutor made use of language which counsel for defendant claimed was improper and asked that the statements of counsel for the state might be reduced to writing, and, together with the objections thereto, made a part of the record, but the stenographer not being in the court room, this was not done.

It appears that the court reproved the prosecuting attorney and in this manner made an effort to remedy the wrong, if any was committed. It is stated that afterwards, and at or near the close of his argument, the prosecutor made another statement to the jury which was highly objectionable in its character and calculated to prejudice the rights of defendant. These events were not properly incorporated in the record, owing to the absence of the official stenographer at the time they occurred, but were made to appear by means of affidavits filed and presented with the motion for a new trial. There was an affidavit made and filed by the county attorney in which he denied the use of the language attributed to him by the affirmations of the affidavits on behalf of plaintiff in error, and further set forth the language employed by him at the times during his argument to which reference was made in the affidavits filed for defendant. The judge who was present at the trial and listened to the argument doubtless heard the words used by the county attorney and understood their import and possessed superior facilities for forming a correct judgment of their probable effect upon the jurors, and saw fit to overrule this ground of the motion for a new trial, and, when viewed in connection with the evidence adduced and all the facts and circumstances in the case, we cannot discover wherein the alleged misconduct of the prosecuting attorney was to any extent or in any degree harmful to the rights of plaintiff in error, hence the ruling of the trial court in this particular must be sustained. (*Debney v. State*, 45 Neb., 856.)

Another assignment of the petition which is urged, is one in relation to alleged misconduct of the jury after the cause was submitted and they had retired to deliberate. The evidence in respect to the allegations of misconduct was directly conflicting, and the finding of the trial court on this point will not be disturbed. It was fully and amply sustained by the evidence. (*Carleton v. State*, 43 Neb., 373.)

It is further urged that defendant was so intoxicated at

Reed Bros. Co. v. First Nat. Bank of Weeping Water.

the time of the acts charged against him as to be incapable of forming an intention to steal, it being charged in the complaint that the breaking and entering the building was done with intent to steal certain liquors. A careful examination of the evidence discloses that the verdict is fully supported as to its element or finding in respect to the intent with which plaintiff in error broke and entered the building. It shows that it was to obtain the liquor, and that when obtained he secreted or assisted in secreting it. The judgment of the district court is

AFFIRMED.

REED BROTHERS COMPANY ET AL. V. FIRST NATIONAL
BANK OF WEEPING WATER.

FILED OCTOBER 15, 1895. No. 5924.

1. **Incorporation of Failing Partnership: LIABILITY OF CORPORATION FOR PARTNERSHIP DEBTS.** Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes, the business of the partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts.
2. **Corporations: RATIFICATION OF ACTS OF AGENTS OR OFFICERS.** The acts of an agent or officer of a corporation which he was not authorized to perform may be ratified by it. The approval may be by express action or indirectly. It may be proved by evidence of a direct recognition or acceptance of the act or an acquiescence, or may be an inference from the facts and circumstances shown.
3. **Fraudulent Conveyances: SALE OF GOODS: GROUNDS OF ATTACHMENT.** Statements by a debtor engaged in a general mercantile business disclosing a determination to defeat the claim of a creditor, and arrangements made in pursuance of such intention, combined with the further facts that the stock of

Reed Bros. Co. v. First Nat. Bank of Weeping Water.

goods has, during several months, been as rapidly as possible converted into cash by sales, and depleted in the aggregate several thousand dollars and no satisfactory account given of the disposition of moneys derived from the sales, may be sufficient to sustain an attachment on the stock of goods on the grounds of a fraudulent disposal or concealment of property.

ERROR from the district court of Cass county. Tried below before HALL, J.

See opinion for reference to authorities.

Byron Clark, Joseph R. Clarkson, and Isaac E. Congdon,
for plaintiffs in error.

Wooley & Gibson, contra.

HARRISON, J.

The First National Bank of Weeping Water commenced this action against Reed Bros. Company, alleged to be a corporation doing business at Weeping Water, E. L. Reed, and James A. Leach to recover the sum of \$6,358.15, alleged, in the petition filed, to be due the bank upon two promissory notes, as executed and delivered to it by the parties named. The answer denied, generally, each and every allegation of the petition except that of the corporate character of Reed Bros. Company, which it admitted, and alleged that the notes sued upon were given for debts which were the liabilities of a copartnership doing business under the name and style of Reed Bros. & Co. and were signed by the company or partnership, and were not a liability of the corporation; and especially denied that the signature of Reed Bros. Company was attached to the notes in suit, or either of them. The reply of the bank was as follows: "Comes now the above named plaintiff, and for reply to defendant's answer denies each and every allegation therein, except such as admit the allegations of plaintiff's petition. Further replying plaintiff alleges that if the notes sued on

Reed Bros. Co. v. First Nat. Bank of Weeping Water.

are not those of Reed Bros. Company, but is the signature of Reed Bros. & Co., that the plaintiff was deceived at the time said notes were signed, and led to believe by the representations of E. L. Reed, president of the corporation, that they were signed Reed Bros. Company, and that it is immaterial whether the signature is Reed Bros. Company or Reed Bros. & Co., for the reason that the assets sought to be reached are those of Reed Bros. & Co. absorbed by Reed Bros. Company, and that while said business is conducted in the name of Reed Bros. Company it is still but a partnership name, the firm of Reed Bros. & Co. having never been legally converted into a corporation, or the corporation of Reed Bros. Company having never been legally formed or incorporated." The counsel for Reed Bros. Company and its co-defendants filed a motion to strike what was styled in the motion the "pretended reply" from the files, the grounds therefor being three in number: First, that the issues were complete without the reply; second, the allegations contained in said pretended reply were immaterial and irrelevant; third, for the reason that the reply was filed without leave of court and out of time. This motion was sustained by the court, but, upon motion, leave was granted to refile it *instantly*. A general demurrer to the reply was then filed, which, upon hearing, was overruled and an exception noted. At some date after the commencement of the action there was filed an affidavit in attachment, the grounds alleged therein being "That the defendants, and each of them, are about to remove their property, or a part thereof, out of the jurisdiction of the court with intent to defraud their creditors; are about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors; have property or rights of action which they conceal; have assigned, removed, disposed of, and are about to dispose of, assign, and remove their property, or a part thereof, with intent to defraud their creditors." An undertaking was also filed and approved

and a writ of attachment issued and served by levy upon a stock of general merchandise then in the possession of, and being handled and sold by the corporation, at its place of business in Weeping Water. There was a separate motion filed for defendants, the corporation, Leach, and Reed, respectively, to discharge the attachment, the reasons being the same in each, and as follows: "First, because the facts stated in the affidavit are not sufficient to justify the issuing of the same; second, because the statement of facts in said affidavit are untrue; third, because the facts set forth in the affidavit are not shown to have existed at the time the order of attachment was issued and the affidavit filed." These motions were heard and overruled and the attachment sustained May 31, 1892, an exception being noted for each party, for whom motion had been filed. During the progress of the case there was a petition filed by the bank, the relief sought being the appointment of a receiver to take possession and dispose of the effects of the corporation, Reed Bros. Company, and after answer to this petition and reply to the answer a trial of the issues with reference to the appointment of a receiver was had and the application was denied. There was a trial to the court without the intervention of a jury, of the issues in the main action, and findings and judgment in favor of the bank, and the attached property ordered sold. Motions for new trial were filed on behalf of each of the parties defendant, and upon hearing they were overruled and exceptions noted on behalf of such parties, and the case has been presented to this court for review.

The first assignment of error which we shall notice is that the court erred in overruling the demurrer to the reply. We are inclined to the view of counsel for plaintiffs in error, that the reply was unnecessary. The existence of the company as a corporation was alleged in the petition and admitted by the answer, and the bank could not in a reply change front entirely and make this a suit against the

copartnership and deny the existence of what it had pleaded in the petition, *i. e.*, the corporate being of the company. It is further assigned for plaintiffs in error in this connection that the court, having overruled the demurrer to the reply and thus outlined the issues, evidence was offered and allowed to be introduced, the tendency and object of which was to show that the corporation was conceived and born of a fraudulent purpose in regard to the creditors of the copartnership, was but a device having for its object the defrauding of creditors of the partnership, and hence without a legal being, and naught but the copartnership under the mask of an attempted incorporation. Evidence of the character indicated was adduced and received during the trial. We think it is quite clear, however, that it was not with the purpose and intent stated by counsel for plaintiffs in error in their argument, but as tending to show how and why the indebtedness, which was originally that of the copartnership, became that of the corporation, and for such purpose it was in the main competent. As we view the action as established by the pleadings, and as, from its course during the hearing, the trial court evidently did, it was against the corporation, and to so maintain it devolved upon the bank, or, failing in this, to fail entirely. The evidence which was introduced at the trial of the application for a receiver, having been presented in transcript form, was allowed and made a part of the testimony during the trial of the issues in the case proper and in respect to the attachment and contained fully as much of the alleged objectionable matter as any other portion of the testimony. If counsel expected to present and insist upon this point in the case they should have, instead of agreeing that it become part of the record, continued their objections. Furthermore, the case was tried by the court without the intervention of a jury, and it must be held to have been considered only in the portions and to the extent it was competent and material, and it follows that the action of the court in

overruling the demurrer, if erroneous, was clearly without prejudice to the rights of the complaining parties.

We will not give a summary of the entire evidence or a discussion of its parts and phrases applicable to the issues, but will refer particularly to those portions which we deem specially indicate the reasons which, probably, largely influenced the trial court to the conclusions reached and announced, and only generally to other portions. It was disclosed by the evidence that there was a copartnership engaged in a general mercantile business in Weeping Water, this state, under the firm name and style of Reed Bros. & Co., and which had existed for a number of years under this or a very similar name; that on or immediately prior to April 1, 1890, the members composing the firm were E. L. Reed, Harry D. Reed, James A. Leach, and Helen F. Reed, or the heirs of Lucius F. Reed, deceased; that on this last mentioned date the firm had an indebtedness of about \$30,000 and was possessed of a stock of goods of the value of \$20,000, and notes and accounts of the aggregate face value of \$10,000 or \$12,000. On this 1st day of April, 1890, the corporation styled Reed Bros. Company was formed, the parties incorporators being the same as the members of the partnership with the addition of J. H. Bellows and R. S. Wilkinson. The \$20,000 worth of merchandise owned by the partnership was made the fund or property basis of the corporation, and stock aggregating a like amount, in shares of \$100 each, was issued and taken by the parties as follows: E. L. Reed, seventy-five shares; Harry D. Reed, twenty-five shares; Helen F. Reed, fifty shares; James A. Leach, twenty-five shares; R. S. Wilkinson, ten shares; and J. H. Bellows, ten shares. The certificates of stock distributed to Harry D. Reed and Helen F. Reed by their face value represented in amount the interest each had in the \$20,000 stock of merchandise when it belonged to the partnership. The twenty-five shares allotted to James A. Leach repre-

Reed Bros. Co. v. First Nat. Bank of Weeping Water.

sented his interest in the partnership and \$690.67, which, it is stated in the evidence, he paid to E. L. Reed at the time the shares of stock were delivered to him. The R. S. Wilkinson shares were executed in his wife's name and were issued in payment of an indebtedness of the partnership to Wilkinson for services rendered for it by him as an employe in the capacity of book-keeper. J. H. Bellows, it is claimed, purchased the ten shares which were allotted to him, and executed and delivered to E. L. Reed his promissory notes in the amount of their face value, which were not paid and the shares were returned to E. L. Reed. It is also of the evidence that the corporation received title to and possession of the merchandise from E. L. Reed, that he guarantied the payment of the debts of the partnership and received the stock of goods for so doing, and turned it over to the corporation, and issued, or caused to be issued, to the persons hereinbefore named, certificates of stock, in the manner and for the purposes we have just indicated, mainly to extinguish their claims as partners against the merchandise as partnership property. It was further shown that the stock of the corporation, except the ten shares standing in the name of Mrs. Wilkinson, was, just a short time prior to the commencement of this action, placed under the control of E. L. Reed, or he was allowed, for some reason which was not disclosed at the trial, to assign it to J. V. Farwell & Co. as collateral security for the payment of indebtedness of the former partnership in the sum of \$8,000, which it is further claimed E. L. Reed had assumed, and of which he had guarantied the payment. The evidence in regard to the inception and formation of the corporation, including its succeeding to the property in and possession of the merchandise and business of the partnership, and the manner in which these events transpired and were effected, has no force in this case to the extent that it is claimed that it shows an illegal and fraudulent attempt to organize a corporation and absorb the as-

sets of the partnership and thus defraud the creditors of the firm, for this action was predicated upon a promise or contract of the corporation and the suit was instituted against it to collect from it, as a corporation, the amount alleged to be due by virtue of its promise. The corporate existence and character of the company were pleaded and recognized in the petition. The action was not in any extent or in any degree to recover whatever of the property of the partnership might be discovered and subject it to the payment of the debts owing by the firm at the time the corporation was created, on the ground of fraud and deceit practiced in its formation, but, under the issue raised by the statement in the answer, that the debts evidenced by the notes in suit "form no liability or claim against the defendant corporation herein," this evidence was competent and material as tending to show that this debt of the firm was assumed by the corporation, although no open agreement was entered into to that effect, and these facts, coupled with the others in evidence, fully warranted a conclusion in this case that the partnership became incorporated and received and accepted a transfer of the assets of the partnership to be appropriated and used in forwarding the objects and purposes of the corporation, and by so doing it assumed the liabilities or debts of the firm. (Cook, Stock & Stockholders [3d ed.], sec. 671; *Williams v. Colby*, 6 N. Y. Sup., 459; *Breman Savings Bank v. Branch-Crookes Saw Co.*, 16 S. W. Rep. [Mo.], 209; *McElwee Mfg. Co. v. Trowbridge*, 62 Hun [N. Y.], 471; *Haslett v. Wotherpoon*, 1 Strob. Eq. [S. Car.], 209; *Booth v. Bunce*, 88 Am. Dec. [N. Y.], 372.)

The testimony in respect to which signature was attached to the notes in suit, whether that of the corporation or of the partnership, was conflicting, and the finding of the trial court that it was the corporate name will not be disturbed. E. L. Reed was president of the corporation, and he was the person who, according to the finding of the trial

Reed Bros. Co. v. First Nat. Bank of Weeping Water.

court, signed the corporate name to these notes. The authority to execute notes for the corporation was conferred upon its secretary and treasurer, and it is contended that the president was without authority to sign the notes, and his doing so did not bind the corporation. The corporation could give notes, it was liable for this debt, and after the notes were signed in its name by the president of the company there was evidence to warrant the conclusion that it acquired knowledge of the act of signing, or that at least it was known to the secretary and treasurer, who was its business manager and who possessed power to act for it in the execution of notes. This, with other evidence bearing upon this point, was sufficient to sustain the finding of the trial court, that the corporation acquiesced in and ratified the act of the president by which its signature appeared upon the notes. (4 Thompson, Corporations, secs. 4941, 5286; *Singer Mfg. Co. v. Belgart*, 4 So. Rep. [Ala.], 400; Taylor, Private Corporations, secs., 212, 214, 215; *Campbell v. Pope*, 96 Mo., 468; *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co.*, 7 Sup. Ct. Rep., 542.)

The assignments of error in this case were mainly directed against the findings made by the trial court, and the views we have expressed dispose of those which refer to the findings on the questions adjudicated in the main case. There are some which relate to the conclusion announced by the trial judge in the attachment branch of the case. The one which we will notice particularly was, in substance, that the stock of goods belonged to the corporation and had for several months been as rapidly as possible converted into cash and the stock reduced in the aggregate at least several thousand dollars, and no satisfactory account was made of the money derived from the sales, and that an intent was shown to defraud at least the plaintiff creditor. The evidence as to some points involved in the attachment portion of the suit was, we think, somewhat meager and unsatisfactory, and we do not deem it necessary, nor do we

Lindsay v. State.

think it would serve any useful purpose to quote from, summarize, or discuss it at length. There was testimony to support the finding of the trial court, and we cannot say, after a careful examination of the evidence, such finding was manifestly wrong, hence it will not be disturbed. The judgment of the district court is

AFFIRMED.

JAMES LINDSAY V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7612.

1. **Criminal Law: RULINGS ON MOTIONS: REVIEW.** A ruling of the district court upon a question of fact presented by motion supported by affidavits will not be disturbed in the supreme court unless such ruling is clearly without support of sufficient evidence.
2. —: **ELECTION AS TO CASE IN WHICH A MOTION WAS FILED: REVIEW.** On a motion made in the district court to compel an election as to whether the case in which the motion was made or another case involving a prosecution for the same offense in the same court should be dismissed, the ruling of the district court cannot be reviewed in the supreme court in the absence of a proper showing that in the district court there were in fact pending two cases of the nature indicated.
3. —: **HOMICIDE: TRIAL: MISCONDUCT OF BY-STANDERS: RE-PROOF: HARMLESS ERROR.** During a trial on the charge of murder, where the mother of the deceased, without incitement thereto or responsibility therefor on the part of the prosecution, in the presence and hearing of the jury, charged the accused with having caused the death of her son, there is found no reversible error, since the record shows that the offender, with the prompt approval of the prosecuting attorney, was promptly by directions of the court removed from the court room, to which she did not return during the trial. Following *Debney v. State*, 45 Neb., 856, and *McMahon v. State*, 46 Neb., 166.
4. —: **MISCONDUCT OF PROSECUTING ATTORNEY: CONVERSATIONS WITH JURORS: HARMLESS ERROR.** While the district

Lindsay v. State.

court might properly set aside the verdict of guilty on the mere showing that the prosecuting attorney, notwithstanding the instructions of the court forbidding conversation with jurors, had talked with one of them, yet where, upon a full disclosure of what was in fact said, and that it had no relation whatever to the subject-matter of the trial in progress, the district court overruled a motion for a new trial, such motion will not be disturbed in the supreme court.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

The facts are stated by the commissioner.

William F. Gurley and Beeson & Root, for plaintiff in error:

The following cases are cited in support of the assignment that the court erred in overruling the motion for a change of venue: *Richmond v. State*, 16 Neb., 391; *State v. Crafton*, 56 N. W. Rep. [Ia.], 257.

The court should have compelled the county attorney to elect whether he would prosecute for prize-fighting or murder. (Criminal Code, sec. 435.)

The scene enacted in the court room during the trial by the mother of the deceased entitles accused to a new trial. (*Dower v. Church*, 21 W. Va., 55; *Coster v. Merest*, 3 Brod. & Bing. [Eng.], 272; *Knight v. Inhabitants of Freeport*, 13 Mass., 217; *Johnson v. Root*, 2 Clif. [U. S.], 108; *Hefron v. Gallupe*, 55 Me., 567.)

There was error in the statements of the prosecuting attorney. (*Hill v. State*, 42 Neb., 503; *Leahy v. State*, 31 Neb., 566; *Johnson v. Root*, 2 Clif. [U. S.], 108; *Cleveland Paper Co. v. Banks*, 15 Neb., 20.)

The judgment should be reversed for misconduct of counsel for the prosecution in communicating with members of the jury. (*Lyons v. Lawrence*, 12 Ill. App., 531; *Commonwealth v. Wormley*, 8 Gratt. [Va.], 712; *State v. Hascall*, 6 N. H., 352; *Springer v. State*, 34 Ga., 379; *Stafford v.*

Lindsay v. State.

City of Oskaloosa, 57 Ia., 748; *Veneman v. McCurtain*, 33 Neb., 643; *Gandy v. State*, 24 Neb., 727.)

There was error in the instructions for the following reasons: They were unnecessarily multiplied (*City of Lincoln v. Holmes*, 20 Neb., 39); the meaning was obscure (*Omaha Street R. Co. v. Craig*, 39 Neb., 601); they failed to present all the issues (*Carruth v. Harris*, 41 Neb., 789); some stating abstract propositions of law were prejudicial (*Vollmer v. State*, 24 Neb., 838; *Ballard v. State*, 19 Neb., 609; *Runge v. Brown*, 23 Neb., 817); they withdrew questions of fact from the jury (*Heldt v. State*, 20 Neb., 493; *People v. Dick*, 32 Cal., 216; *People v. Casey*, 65 Cal., 260; *State v. Mackey*, 12 Ore., 154; *State v. Whitney*, 7 Ore., 386; *Dolan v. State*, 44 Neb., 643.)

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and C. S. Polk, for the state:

The motion for a change of venue was properly overruled. (Criminal Code, sec. 455; *State v. Crinklaw*, 40 Neb., 759; *Smith v. State*, 4 Neb., 286; *Olive v. State*, 11 Neb., 1; *State v. Dunn*, 53 Ia., 526; *State v. Williams*, 63 Ia., 135; *State v. Perigo*, 70 Ia., 661; *State v. Beck*, 73 Ia., 616; *Perrin v. State*, 81 Wis., 135; *State v. Rowland*, 72 Ia., 327; *King v. State*, 20 S. W. Rep. [Tenn.], 169; *Horn v. State*, 13 So. Rep. [Ala.], 329; *Power v. People*, 28 Pac. Rep. [Colo.], 1121; *Muscoe v. Commonwealth*, 12 S. E. Rep. [Va.], 790; *State v. Lee*, 12 S. W. Rep. [Mo.], 254; *People v. Goldenson*, 19 Pac. Rep. [Cal.], 161; *Hasson v. Commonwealth*, 11 S. W. Rep. [Ky.], 286.)

The court did not err in overruling the accused's motion to require the prosecuting attorney to elect as to the information upon which he would proceed to trial. (*Commonwealth v. Bubser*, 80 Mass., 83; *Commonwealth v. Harrison*, 77 Mass., 308; *Commonwealth v. Bakeman*, 105 Mass., 53; *Commonwealth v. Harris*, 13 Allen [Mass.], 534; *State v. Standifer*, 5 Port. [Ala.], 523; *Commonwealth v. An-*

Lindsay v. State.

drews, 2 Mass., 408; *Vaughan v. Commonwealth*, 2 Va. Cases, 273; *Teat v. State*, 24 Am. Rep. [Miss.], 708.)

The conduct of the mother of deceased in the presence of the jury during the trial is not sufficient ground for reversal in view of the action of the court in reference thereto. (*State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461; *State v. Laxton*, 78 N. Car., 564.)

Prejudice to accused did not result from misconduct of the jury or officers of the court. (*State v. Craig*, 43 N. W. Rep. [Ia.], 462; *State v. Richmond*, 7 So. Rep. [La.], 459; *State v. Bellow*, 7 So. Rep. [La.], 782; *State v. Harper*, 7 S. E. Rep. [N. Car.], 730; *Bailey v. State*, 9 S. W. Rep. [Tex.], 270; *Boyett v. State*, 9 S. W. Rep. [Tex.], 275; *Commonwealth v. Gagle*, 18 N. E. Rep. [Mass.], 417; *Territory v. Clayton*, 19 Pac. Rep. [Mont.], 293; *People v. Yut Ling*, 16 Pac. Rep. [Cal.], 489; *Prewitt v. State*, 4 So. Rep. [Miss.], 346; *State v. Peyton*, 2 S. W. Rep. [Mo.], 394; *State v. Collins*, 86 Mo., 250; *Territory v. Hart*, 7 Mont., 489.)

To sustain the instructions the following cases are cited: *Carleton v. State*, 43 Neb., 373; *Seville v. State*, 49 O. St., 117.

RYAN, C.

Plaintiff in error was convicted of manslaughter in the district court of Cass county. His term of imprisonment in the penitentiary was by the judgment of the court fixed at two years. By mutual agreement the plaintiff in error and Fletcher Robbins engaged in an exhibition about midnight between August 9 and August 10, 1894. An entrance fee was charged for the privilege of witnessing the entertainment, and a prize of \$200 was to be paid to the successful contestant. The prosecution insisted upon the trial that this contest was a prize fight. The defense described it as "a sparring match for scientific points." The accused, upon his cross-examination, when asked what

was boxing for scientific points, answered: "The men stand off and hit each other with the back of their gloves." It is not, perhaps, within the lines of the orderly discussion of this case now to say it, but we cannot forbear the present observation that whether the descriptive term of "prize fight" or the more euphonious designation "sparring for scientific points" is employed, one fact without question was established by the evidence, and that was that the accused caused the death of Fletcher Robbins.

In the brief submitted on behalf of the plaintiff in error the first proposition discussed, which has not already received incidental notice, is that the court erred in overruling the motion for a change of venue. Technically this ruling could be sustained upon the authority of *Olive v. State*, 11 Neb., 1, for the motion was in terms for a change of venue to the county of Otoe. We are mindful, however, that Otoe county and Cass county constitute the second judicial district, and that, therefore, if the motion had been made in the most approved form and had been sustained, the result would have been of necessity the same as though sustained in the form in which it was made. An examination of the affidavits submitted in support of the motion with those in opposition convinces us that this assignment is not well founded as a matter of fact, for nearly all the affirmative affidavits ascribed such prejudice as existed to the inhabitants of Plattsmouth, a city which is shown to contain but about one-fourth of the inhabitants of Cass county; and the negative affidavits fairly overcame the force of those in resistance of which they were filed.

The next contention for plaintiff in error relates to the refusal to compel the county attorney to elect whether he would prosecute upon the information in this case or for engaging in a prize fight charged, as was alleged in the motion, in another case pending in the same court. In the record we find no proof that such a prosecution as that last described was ever pending in the district court of Cass

Lindsay v. State.

county. The reliance of counsel apparently is upon that part of the motion which states: "Reference is hereby made to the records and files of the court in support of this motion." In *Lowe v. Riley*, 41 Neb., 812, it was held: "A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill filed in an independent case not being sufficient." On the same principle it is not proper to ask a ruling in this court upon a question of fact not presented by the record under consideration.

While the trial was in progress the mother and a sister of Fletcher Robbins were seated near and within sight of the jurors. The accused was called to the witness stand in his own behalf. Just as he took his seat the mother of the deceased suddenly arose and, stepping forward, pointed her finger at the prisoner in an excited manner and cried out; "You have killed my boy! You have killed my boy!" This is assigned as error because, first, it was permitted by the county attorney, and second, because it prevented a fair trial. In regard to the alleged remissness of the county attorney it is but fair to say that Mrs. Robbins had been told by him before the trial began that her attendance was not necessary; that he had no reason to expect that this lady would in any way interfere with the orderly course of the trial, and that, as soon as the scene above described took place, he joined the attorney for the prisoner in the request that Mrs. Robbins be removed from the court room. On the assignment that a fair trial was prevented it is proper to say that immediately after Mrs. Robbins used the language above quoted she was by direction of the presiding judge removed from the court room and was not again present during the trial. The language of Chief Justice NORVAL, in an opinion filed October 1, 1895, in *Debney v. State*, 46 Neb., 856, so well illustrates the rule which should govern the branch of the case under

consideration that without comment it is reproduced as follows: "It appears that at the close of the argument of the county attorney to the jury the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. * * The incident complained of occurred in the presence and hearing of the trial judge and he is better enabled than we to determine the effect, if any, the applause had upon the jury. By overruling the motion for a new trial containing an assignment relating thereto, submitted upon the affidavits both on behalf of the accused and the state, the trial court must have been of the opinion that the demonstration was not of such a nature as to influence the verdict, and no prejudice being shown its determination will not be interfered with. (*Edney v. Baum*, 44 Neb., 294; *State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461.)" (See, also, *McMahon v. State*, 46 Neb., 166.) The language quoted is applicable to another error alleged, to-wit, that the prosecuting attorney misquoted the testimony of one of the witnesses as to the manner in which the accused had managed to inflict injuries upon the person of the deceased.

After the jury had been impaneled the court directed that the jurors should not be permitted to separate or to communicate with outside parties except within the limitations which, in that connection were prescribed, and were such as were indispensable to arriving at and returning a verdict. It is now insisted that the district court erred in refusing to set aside the verdict upon the showing made in the motion for a new trial. There were minor violations of these instructions of the court urged, but as to them it is unnecessary to enter into an extended review of the evidence submitted, for it was insufficient to justify any disapproval of

Lindsay v. State.

the ruling complained of. The principal offense in this respect is imputed to E. H. Wooley, Esq., an attorney who assisted the county attorney in conducting the prosecution in the district court. As the misconduct alleged is charged against one of the managers of the prosecution, who, by reason of being a member of the bar, should not be permitted to urge ignorance as an excuse, it is deemed best to set out the evidence on this point at considerable length.

The plaintiff in error made affidavit that at about 11 o'clock P. M. of the day preceding that on which this cause was finally submitted to the jury the said affiant was upstairs in the Perkins Hotel at Plattsmouth; that upon request of his attorney he went down-stairs to the hotel office for some cigars; "that when affiant then came down-stairs at said hour he saw five of the jurymen before whom the above entitled cause was being tried; that affiant could not discover the whereabouts of the other seven members of said jury; that the said five members of said jury were sitting down in said office and engaged in conversation; that in the midst of the group composed of said jurymen was E. H. Wooley, prosecutor for the state in this case; that the said Wooley was talking, but what he said the affiant did not hear, nor did he hear what any of the said jurymen said."

The affidavit of Mr. Gurley, one of the attorneys for the accused, showed that when Mr. Lindsay was in affiant's room he was sent to the hotel office on an errand, "and that in about fifteen or twenty minutes defendant returned and stated to the affiant that five of the jurymen in said case, together with the deputy sheriff and E. H. Wooley, one of the attorneys for the prosecution, were seated down-stairs in the office of said hotel, apparently engaged in conversation; that defendant stated that he could not discover the whereabouts of the other jurymen."

This was all that was disclosed in the affidavits in support of the motion for a new trial with reference to the al-

leged misconduct of Mr. Wooley. In view of the fact that in a matter of this kind a presumption is more likely to arise against an attorney assisting in or conducting the prosecution than against a disinterested party, it is required that what really transpired should be set out as shown in the affidavits submitted for that purpose.

Mr. Wooley's counter-affidavit showed that between 10 and 11 o'clock of the night referred to in the affidavit of Mr. Lindsay, and in that of Mr. Gurley, he went to the Perkins Hotel, and having removed his hat and coat, "stepped near the stove for the purpose of warming himself; that there were present R. W. Hyers and several of the jurors that tried this case—affiant does not remember how many of said jurors were present; that said Hyers was a deputy sheriff or bailiff in charge of the jury; that affiant and John Adams engaged in conversation upon the subject of irrigation, the said Adams being six or eight feet distant from affiant, and that all of said conversation was audible to those present, and that not a word was said at that time, either by the affiant or any one else, regarding this case; that such conversation continued for a period of about ten minutes, when said Hyers took all the said jurors up to their room."

R. W. Hyers, in his affidavit, said that as deputy sheriff of Cass county he had charge of the jurors in this cause. His language in one part of the affidavit was as follows: "This affiant further states that during the whole time that he had charge of said jury no person whatever except the officers in charge of said jury ever spoke to any member of said jury on any subject whatsoever, except at one time when a few words passed between juror Adams and attorney Wooley on the subject of irrigation; that at no time was any person allowed to mingle with said jury, and at the time said Adams spoke to said Wooley they were not nearer than eight feet." In his affidavit Mr. Hyers stated that when the above conversation took place, five of the

Lindsay v. State.

jurors were present, having just returned from the water-closet with affiant, and that on their way back to their room these five jurors, with affiant, had stopped to warm themselves at the stove in the hotel office when the conversation between Mr. Wooley and Mr. Adams took place.

In respect to this conversation Mr. Adams in his affidavit stated that during the trial he had had no conversation on any subject "except on the evening of March 6, when a few of the jurors in charge of the deputy sheriff, R. W. Hyers, on returning from the water-closet, stopped a few moments at the stove of the hotel to warm themselves, and, while there, the said Hyers entered into a short conversation with attorney Wooley on the subject of irrigation, and while they were thus conversing the affiant addressed a few questions to them on the same subject; that this is the whole conversation had by the affiant with any one not a court officer in charge of the jury."

It is apparent to the most casual reader of these affidavits that there was no attempt to show by either Mr. Lindsay or Mr. Gurley what conversation took place between Mr. Wooley and any member of the jury. From the fact unexplained that an attorney for the prosecution, contrary to the directions of the court, conversed with one of these jurors the district court would be justified in setting aside the verdict of guilty afterwards returned. In this case, however, while Mr. Wooley should not so far have disregarded the instructions of the court as to converse with one of the jurors upon the most innocent subject, yet we cannot believe that this indiscretion should be fraught with consequences so serious as the reversal of the judgment of conviction when the conversation could have had no tendency to prejudice the right of the accused to a fair and impartial trial.

There are several criticisms of the instructions given and of those refused, but we are not able to discover substantial grounds for an inference of prejudice either from giving or

Conley v. State.

refusing instructions. It is quite probable that nothing would have been lost, and something would have been gained, had fewer instructions been given. Counsel for the accused presented every question possible in different forms and by repeated requests for instructions, and it was evidently to meet every phase presented that the numerous instructions were given. In modifying such instructions as were modified there was no prejudicial change made, though, perhaps, in some instances the instructions might as well have been given as requested. The judgment of the district court is

AFFIRMED.

DOUGLAS S. CONLEY V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7446.

1. **Sheriffs: CONVERSION: EMBEZZLEMENT.** A sheriff is an officer elected to an office of public trust in this state, and for the conversion to his own use of any moneys that shall come into his hands by virtue of his office may be prosecuted for embezzlement under section 121 of the Criminal Code.
2. ———: ———: ———: **INFORMATION.** Where a sheriff by virtue of an order of sale issued upon a decree of foreclosure had sold the lands therein described and collected the amount of the bid of the purchaser, which, before an order of the court directing to whom it should be paid out had been made, he had converted to his own use, it was not essential in an information against such officer to allege to whom such money belonged, and an allegation of that kind should be rejected as surplusage when the information independently of such allegation fully stated the facts above indicated.

ERROR to the district court for Phelps county. Tried below before BEALL, J.

J. L. McPheely, Hall, St. Clair & Roberts, and F. G.

Conley v. State.

Hamer, for plaintiff in error, cited: *People v. Allen*, 5 Den. [N. Y.], 76; *Stoker v. People*, 114 Ill., 320; *State v. Denton*, 22 Atl. Rep. [Md.], 305; *Doyle v. Alderman of Raleigh*, 45 Am. Rep. [N. Car.], 677; *Worthy v. Barrett*, 63 N. Car., 199; *Eliason v. Coleman*, 86 N. Car., 235; *State v. Stanley*, 8 Am. Rep. [N. Car.], 488; *Walker v. City of Cincinnati*, 21 O. St., 14; *Braithwaite v. State*, 28 Neb., 835; *Burke v. State*, 34 O. St., 79; *Lightner v. Steinagel*, 33 Ill., 513; *Reg. v. Gibbs*, Dears [Eng.], 445; *State v. Foster*, 11 Ia., 291; *Rex v. Mason*, Dowl. & R. N. P. [Eng.], 22; *Rex v. Barker*, Dowl. & R. N. P. [Eng.], 19; *Reg. v. Glover*, Leigh & C. [Eng.], 466; *Reg. v. Fletcher*, Leigh & C. [Eng.], 180; *Reg. v. Hastie*, Leigh & C. [Eng.], 269; *Rex v. Hodgson*, 3 C. & P. [Eng.], 422; *State v. Butler*, 5 Am. Crim. L. [S. Car.], 207; *Snapp v. Commonwealth*, 6 Am. Crim. L. [Ky.], 189.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state, cited: *Doyle v. Alderman of Raleigh*, 89 N. Car., 133; *People v. Bedell*, 2 Hill [N. Y.], 196; *Vaughn v. English*, 8 Cal., 41; *In re Corliss*, 11 R. I., 638; *State v. Brooks*, 42 Tex., 63; *Ogden v. Raymond*, 22 Conn., 379; *State v. Anderson*, 45 O. St., 196; *Commonwealth v. Tuckerman*, 76 Mass., 173; *State v. Tompkins*, 32 La. Ann., 620; *Commonwealth v. Ricketson*, 5 Met. [Mass.], 412; *Taylor v. Shemwell*, 4 B. Mon. [Ky.], 575; *McDowell v. Crawford*, 11 Gratt. [Va.], 377; *Hess v. Wilcox*, 58 Ia., 380; *Tierney v. Spiva*, 76 Mo., 279; *Ruggles v. Coffin*, 70 Me., 468; *Breedlove v. Bundy*, 96 Ind., 319; *Fisher v. State*, 40 N. J. Law, 169.

A. J. Shafer, also for the state.

RYAN, C.

The plaintiff in error was convicted of embezzlement in the district court of Phelps county. There were three counts in the information, but as the verdict of guilty referred

only to the offense described in the last count, this alone need be considered. In this count it was charged that Douglas S. Conley, at all times referred to, was the sheriff of the aforesaid county; that said office of sheriff was one of public trust; that said Conley on August 16, 1893, as sheriff, made and conducted a sale of the northwest quarter of section 30, in town 5 north, of range 19 west, 6th P. M., the said land being in Phelps county, by virtue of an order of sale issued and directed to him as such sheriff in an action of foreclosure of mortgage had by the Colonial & United States Mortgage Company (Limited) against Charles A. Draws and others; that as such sheriff and public officer, and by virtue of his said office of public trust, he received \$667, the amount bidden on the sale. The embezzlement charged was the unlawful conversion of the sum above mentioned by said sheriff to his own use without the consent of the mortgage company aforesaid.

The facts above charged were unquestionably established by the evidence. It is contended on behalf of the plaintiff in error, however, that in the information there was no averment, and by the evidence no proof that the mortgage company was a corporation. It is furthermore insisted that since by the information, in addition to the averments already noted, it was charged that the money misappropriated belonged to the mortgage company above described, the conviction cannot be sustained, for the reason that the proofs merely showed that the amount of the bid was paid into the sheriff's hands, and that, at least until ordered paid to said mortgage company, that company had no ownership of it. There was a confirmation of the foreclosure sale, but there has been no order to pay the proceeds of the sale to any one. The sale by foreclosure is regarded as a sale by the court itself, conducted by means of its executive officer, the sheriff, liable as such, or by some other person thereto authorized by the court. (Code of Civil Procedure, sec. 852.) In case of a refusal to pay the amount of his bid a

purchaser may be compelled to complete his purchase by such payment. (*Gregory v. Tingley*, 18 Neb., 318; *State v. Holliday*, 35 Neb., 327.) By section 854, Code of Civil Procedure, it is provided that "the proceeds of every sale made under a decree in chancery shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus, it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court." The clause last quoted applies not merely to the surplus but to the entire proceeds of the sale, which, therefore, are "subject to the order of the court," until paid out. In the case at bar it was shown that by the decree of foreclosure there had been adjudged due to the Colonial & United States Mortgage Company the sum of \$781.45. For the payment of this sum with interest and costs a sale was directed, and the return of the sheriff upon the order of sale issued under this decree recited that after payment of costs there was applicable to the judgment the sum of \$600.28. Until this return was approved by the court this money in strictness would not belong to the foreclosure plaintiff. The information supported by the proofs showed fully how the money was realized and in what situation it was when misappropriated. The conclusion of the county attorney that the money belonged to the mortgage company, superadded to the essential facts set out in the information, was merely surplusage and may therefore be ignored. If required to allege correctly who would be entitled to the money when the court should direct its distribution, the county attorney, in a case like that under consideration, would have been required to state not only all existing facts, but in effect, anticipating the future, would be required to state what order the court would have made had the money in the meantime not been misappropriated. The law does not require a vain thing, and this, if a requirement, would amount to nothing less. If there was no requirement of mention of owner-

ship as above indicated, there was no necessity that by the information or proofs should be described the corporate capacity of one whose ownership was not required to be shown. That part of section 121 of the Criminal Code which is essential in this case is in this language: "If any officer elected or appointed to any office of public trust in the state * * * shall embezzle or convert to his or her own use any money, property, rights in action, or other valuable security or effects whatever, belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, * * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled."

It is urged that the sheriff, in conducting the sale which he did, and afterwards acting as custodian of the moneys realized, was not acting as an officer elected to an office of public trust. In support of this position several adjudged cases have been cited with great apparent confidence. Of these we shall notice such as in oral argument were specially relied upon, and from their similarity to each other it may readily be inferred upon what lines all the cited cases were determined. The case more relied upon than any other was *Stoker v. People*, 114 Ill., 320. In that case an indictment had been found against Stoker, a constable, who, by virtue of certain executions in favor of Aultman, Miller & Co. entrusted to him as such officer, had collected over \$200 which he had failed to pay over. The section of the statute under which this prosecution was had provided: "Whoever embezzles or fraudulently converts to his own use * * * money, goods, * * * delivered to him which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny." The court held that no conviction should have been had under the provisions of this section, for the reason that it was

Conley v. State.

general in its terms and did not contain the word "constable," whereas, in section 79 of the same chapter, in which the section quoted is found, there was express mention of constables in connection with a different definition of embezzlement. *People v. Allen*, 5 Den. [N. Y.], 76, is also a favorite citation of the plaintiff in error. In that case Snyder had employed Allen, a constable, to collect several bills due him. This constable was authorized to take out summonses before a justice of the peace named and go with them and demand payments. If the demand was paid, process was not to be served, but if not, service was to be made and Allen was then to appear for Snyder and obtain judgment. Daniel Darrow paid one of these bills against him on presentation; nevertheless, without service of process, Allen procured a judgment against him in favor of Snyder. The indictment of Allen was for embezzling the amount he, as an agent of Snyder, had collected of Darrow. In the supreme court it was held that as the statute limited the term "embezzlement" to clerks and servants, an indictment which charged that the misappropriation was by an agent was bad. In *State v. Denton*, 22 Atl. Rep. [Md.], 305, the indictment of clerk of the board of county commissioners as a public officer was held bad for the reason that such clerk was appointed under a statute which provided: "The county commissioners of each county in this state are declared to be a corporation and shall have full power to appoint * * * road supervisors, collectors of taxes, trustees of the poor, a clerk to their board, and all other officers, agents, and servants required for county purposes." There is no argument necessary to show how inapplicable these adjudications are to the facts of the case which we have under consideration. A further review of citations would but serve to present for consideration other cases equally foreign to our inquiry. It admits of no question that a sheriff is a public officer; that is, one who has a duty to perform concerning the public, as defined in *Hill v. Boy-*

land, 40 Miss., 625. He is equally to be so regarded under the definition given in *Bunn v. People*, 45 Ill., 400, that, "Every man is a public officer who hath any duty concerning the public; and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and nature of that duty which make him a public officer and not the extent of his authority." Of like applicability is this definition in *Bradford v. Justices' Inferior Court*, 33 Ga., 336, to-wit: "Where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, * * * he must be regarded as a public officer." The language of section 121, Criminal Code, is "if any person elected or appointed to any office of public trust, etc." This is, in effect, if any public officer; for, in *Matter of Daniel Wood*, 1 Hopk. Ch. [N. Y.], 8, it was said: "The words 'public trust,' still more comprehensive, appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service." It has already been noted that the plaintiff in error when he misappropriated the funds in his hands was acting as sheriff. By virtue of his office of public trust he obtained and appropriated to his own use this money, is but a concise and accurate description of his offense which is clearly within the terms of the statute under which he was convicted.

It is complained that one of the jurors had expressed an unqualified opinion as to the guilt of Conley before he was called into the box. We have considered fully this complaint, and our conclusion is that there exists no ground for this contention. The proofs submitted on this point show that just before the juror was called he said he hoped he would not be required to serve in this case. When asked how he would avoid it when called, he said that he would tell them that he would send the prisoner up for life, so that he, the juror, would get off the jury. This was not

American Water-Works Co. v. State.

the expression of an opinion. It was but an excuse which he said that he would present to avoid being compelled to serve. This juror, on oath, said that this was spoken in jest, merely, and this we are inclined to believe, for in his *voir dire* examination submitted for our consideration no such language occurs.

There is no question presented or argued which has not been already discussed, and there being found no error in the record the judgment of the district court is

AFFIRMED.

AMERICAN WATER-WORKS COMPANY V. STATE OF
NEBRASKA, EX REL. W. I. WALKER.

FILED OCTOBER 15, 1895. No. 5152.

1. **Pleading: DEMURRER.** A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.
2. **Water Companies: DUTY TO INHABITANTS OF CITY: PUBLIC USE.** A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant for water furnished the same price it charges every other inhabitant for the same service under the same or similar conditions.
3. —: **RULES.** Such a corporation has the right to adopt all such rules for its convenience and security as are reasonable and just, and to decline to furnish water to any inhabitant who refuses to comply with such reasonable rules.

4. ———: ———. For such a rule to be valid and enforceable it must in itself be lawful and just and must not be discriminatory in its nature.
5. ———: ———: VALIDITY OF CHARGE FOR TURNING ON AND OFF WATER. A rule of a private corporation engaged in supplying a city and its inhabitants with water in pursuance of a franchise granted by such city, provided: "Water rents will be due and payable on the 1st days of January and July of each year in advance at the company's office. * * * If not paid within thirty days after they fall due, the water will be turned off and not turned on again until all back rents are paid, including a charge of \$1 for turning the water off and on." *Held*, That so much of said rule as required a patron in default for water rents to pay \$1 as a condition precedent to his right to again be furnished with water was unreasonable, discriminatory, and void.
6. ———: ———: ———: MANDAMUS. A patron of such corporation failed to pay his water rent on July 1. His default continued to August 17, when the corporation shut the water off from the patron's premises. August 18 the patron tendered the corporation the water rent fixed by its rules from July 1 to December 31, and requested that the water might again be turned on, but refused to pay the \$1 required by the rule for turning on and off the water. *Held*, (1) That the corporation would be compelled by *mandamus* to turn the water on the patron's premises; (2) that the inability of the corporation to collect the \$1 from the patron by the ordinary process of law, because of the latter's insolvency, afforded no excuse to the corporation for not supplying the patron with water.
7. Public Corporations: DISCRIMINATION: MANDAMUS. *State v. Nebraska Telephone Co.*, 17 Neb., 126, followed and reaffirmed.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

The facts are stated in the opinion.

Connell & Ives, for plaintiff in error:

The water company has the right and power to make and enforce the regulation providing for a charge for shutting off and turning on water, provided it is a reasonable rule

and free from the charge of unlawful discrimination. (*Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518; *Girard Life Ins. Co. v. City of Philadelphia*, 88 Pa. St., 394; *Wendell v. State*, 62 Wis., 300; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 539; *Rockland Water Co. v. Adams*, 24 Atl. Rep. [Me.], 840; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 28 Pac. Rep. [Wash.], 517; *Thomas v. Peterson*, 24 S. W. Rep. [Tex.], 1125; *William v. Mutual Gas Co.*, 18 N. W. Rep. [Mich.], 236; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 539; *State v. Sedalia Gas Light Co.*, 34 Mo. App., 501; *Ferguson v. Metropolitan Gas Light Co.*, 37 How. Pr. [N. Y.], 191; *People v. Manhattan Gas Light Co.*, 45 Barb. [N. Y.], 136.)

The rule in controversy does not make an unlawful discrimination, and is a reasonable rule. (2 Rorer, Railroads [ed. 1884], 1369).

The *Webster Telephone Case*, 17 Neb., 126, does not apply for the following reasons: (1.) In that case no violation of a general rule or regulation of the respondent was shown. (2.) The reasonableness of the respondent's charge against the relator was in dispute between the parties. (3.) The relator was financially able to respond to any judgment which the telephone company might obtain against him. (4.) The action of the respondent was arbitrary and discriminative against the relator.

Charles A. Goss, contra:

The rule of the company providing for a charge of one^o dollar for shutting off the water and turning it on is unreasonable and should not be enforced. (*Shiras v. Ewing*, 48 Kan., 170; *Shepard v. Milwaukee Gas Light Co.*, 11 Wis., 234; *McDaniel v. Springfield Water-Works Co.*, 48 Mo. App., 273; *Gas Light Co. v. Colliday*, 25 Md., 1; *Lloyd v. Washington Gas Light Co.*, 1 Mackey [D. C.], 331; *Morey v. Metropolitan Gas Light Co.*, 38 N. Y. Superior Ct.,

185; *New Orleans Gas Light Co. v. Paulding*, 12 Rob. [La.], 378; *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. [N. Y.], 33; *Gray v. Elbling*, 35 Neb., 278.)

The rule is discriminatory. (*Webster Telephone Case*, 17 Neb., 126; *Jeffersonville R. Co. v. Rogers*, 38 Ind., 116; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind., 293; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457.)

RAGAN, C.

The state of Nebraska, upon the relation of W. I. Walker, filed an application in the district court of Douglas county against the American Water-Works Company (hereinafter called the "Water Company") for a peremptory writ of *mandamus* to compel the Water Company to furnish the relator water for use at his residence in the city of Omaha. The relator alleged in his application that the Water Company was a corporation doing business in the city of Omaha; that it was a common carrier and furnisher of water to the city of Omaha and its inhabitants; that it had secured a franchise from the city in and by which it had the right to use the streets, alleys, and public grounds thereof for laying its water mains and erecting its hydrants; that it was in the possession and use of the streets and alleys of said city for the purpose of supplying said city and its inhabitants with water; that the relator occupied a dwelling on Davenport street, in said city, near which dwelling the Water Company had a water main; that the Water Company had furnished him water at his premises since the 10th of February, 1890, at the rate charged by the Water Company of \$11 per year; that he had always paid his water rents promptly on the 1st days of January and July in each year, as required by the rules of the company, until the 1st day of July, 1891; that his water rents were paid up to the last day mentioned; that on said date there became due to the Water Company \$5.50, being the water rents from that date to the 1st day of January, 1892; that

he was absent from home on the 1st of July, 1891, and remained absent until about the first of August of that year; that by reason of the press of business he forgot after his return to pay his water rents until the 17th day of August, when the Water Company shut the water off from his residence; that on the 18th of August he went to the office of the Water Company in the city of Omaha and tendered it the rent from the 1st day of July, 1891, to the 1st day of January, 1892, and requested the Water Company to turn on the water at his residence, and that the Water Company refused to do so. The answer of the Water Company to the relator's application, so far as material here, alleged: That the relator had actual notice of the rules and regulations of the Water Company; that these rules were reasonable; that they were proper and necessary for carrying on its business and supplying water to its customers, and were enforced against all citizens and customers alike; that among such rules and regulations was the following: "Water rents will be due and payable on the 1st days of January and July of each year in advance at the company's office. * * If not paid within thirty days after they fall due, the water will be turned off and not turned on again until all back rents and charges are paid, including a charge of \$1 for turning the water off and on;" that the relator refused to comply with this rule by paying the sum of \$1 as required by it for turning the water off and on at his premises, and that relator was insolvent. The relator submitted a demurrer to this answer, which the district court sustained and issued the writ prayed for.

1. It is insisted that the judgment of the district court is wrong because the answer alleges, and the demurrer admits, that the charge of \$1 demanded of relator for turning off and on the water was a reasonable charge; that the rule itself was a reasonable and proper and necessary to the carrying on of respondent's business and that relator was insolvent. But we are of opinion that all these aver-

ments of the answer, except the one as to the insolvency of the relator, are mere conclusions of law. "A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense; but it does not admit the correctness of the conclusions of law therein set out." (*Smith v. Henry County*, 15 Ia., 385; *Branham v. Mayor of San Jose*, 24 Cal., 585.)

2. The allegation in the answer that the relator was insolvent, we think, tendered an immaterial issue, as will be seen further on.

3. The Water Company, though a private corporation, by virtue of the franchise granted it by the city of Omaha and its user of such franchise, became affected with a public use. By accepting such franchise and entering upon the business of furnishing water to the city and its inhabitants it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city for water furnished the same price it charges every other inhabitant for a like service under the same or similar conditions. (*Williams v. Mutual Gas Co.*, 18 N. W. Rep. [Mich.], 236; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 526.) And we have no doubt but that the Water Company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory. (*Shepard v. Milwaukee Gas Light Co.*, *supra.*) Is the rule pleaded by the respondent in its answer a reasonable and valid one with which relator must have complied as a condition precedent to his right to compel respondent to furnish him water? It is to be observed that the rule provides that if default shall be made in the payment of water rents the water shall be turned off and that

it will not be again turned on until two things are done: First, all back rents and charges paid; second, the payment of \$1 extra for turning off and on the water. As the regulator in this case tendered to the respondent the water rents from the 1st of July, 1891, to the 1st of January, 1892, the question whether that part of the rule requiring one in default for water rents to pay such rents as a condition precedent to his right to have the water turned on again is not necessarily involved in this case. The precise inquiry here is whether that part of the rule is reasonable which requires one in default for water rents, in order to procure the use of water, to pay this charge or penalty of \$1. To be valid and enforceable it must in itself be lawful and reasonable and just, and it must not discriminate between persons similarly situated. The reasonableness and validity of the rules of private corporations which had assumed the performance of public duties, or by reason of the acceptance of franchises, and engaging in the business of serving the public by supplying it with water, gas, etc., and had thereby become public service corporations, have been frequently before the courts, but, so far as we know, no court has suggested a test for determining whether or not the rules of such a corporation are reasonable.

In *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 28 Pac. Rep. [Wash.], 517, it is said in the syllabus: "A rule of a water company which requires water rates to be paid quarterly, adds a penalty of five per cent in case of default of payment for ten days, and provides that after a default for fifteen days the water shall be shut off from the premises is a reasonable regulation."

In *Williams v. Mutual Gas Co.*, 18 N. W. Rep., [Mich.], 236, it was held: "The requirement of a deposit of money to guaranty the payment of the price of the gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with."

In *Shiras v. Ewing*, 48 Kan., 170, it was held that a

rule of a water company giving it the right to shut off water from the premises of a consumer who wastes it is reasonable.

In *People v. Manhattan Gas Light Co.*, 45 Barb. [N.Y.], 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past due gas bills was affirmed.

In *Shepard v. Milwaukee Gas Light Co.*, *supra*, the reasonableness of several rules of the gas company were considered. The ninth rule authorized the company, by its inspector, to have free access at all times to buildings and dwellings, to examine the whole apparatus and for the removal of the meter and service pipe. The court said: "This regulation is too general and cannot be upheld, or at least a party cannot be required to subscribe to it to entitle him to be furnished with gas." Rule 14 provided that the company should have the right at any time to shut off the gas if it should find it necessary to do so to protect itself from fraud. The court said: "Here the company assume the whole power to decide upon the question of abuse or fraud either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. * * * It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud, as the law provides for individuals." Rule 16 provided that after the admission of gas into the fittings they should not be disconnected or opened, either for alteration or repairs, or extensions, without a permit from the company, which might be obtained at the company's office, free of expense, "and any gas fitter or other person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby." The court said: "It is not to be allowed that the gas company can impose penalties in this way, or make the sub-

mission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular, if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so."

In *Gas Light Co. of Baltimore v. Colliday*, 25 Md., 1, it was held that the gas company could not refuse to furnish gas to a person because he refused to pay a former gas bill or a bill contracted for gas used on other premises. (See *Lloyd v. Washington Gas Light Co.*, 1 Mackey [D. C.], 331; *New Orleans Gas Light Co. v. Paulling*, 12 Rob. [La.], 378.)

In *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. [N. Y.], 33, a dispute arose between the gas company and the consumer, and it was held that the latter was entitled to have his rights investigated by the courts, and that the company would be enjoined from cutting off the gas until a trial of the case could be had.

In *Rockland Water Co. v. Adams*, 24 Atl. Rep. [Me.], 840, a rule of the water company provided that users of water should be liable to pay rent for the whole year, whether they actually used it for that length of time or not, and the payments for water should be made yearly in advance. This rule was held to be unreasonable and void.

In *State v. Nebraska Telephone Co.*, 17 Neb., 126, during the year 1883, Webster had a telephone in an office, but the telephone company for some reason neglected to furnish him a list of its subscribers residing in the city of Lincoln and other cities and villages reached by its telephone lines. When Webster's telephone rent became due he refused to pay for that part of the time he had used the telephone and during which he had been deprived of the list of subscribers. A dispute arose between Webster and the telephone company, and the company removed its telephone from

Webster's office. Some time after that Webster requested the telephone company to put a telephone in his office, and tendered the company the sum charged its regular subscribers for such work. It does not appear that Webster tendered his telephone rents in advance nor that the rents were payable in advance, but it appears from the report of the case that Webster was financially able to pay the telephone rents when they matured. The telephone company refused to put in the telephone, alleging that the telephone had been removed from Webster's office by reason of his refusal to pay his rents. Webster then applied to this court for a *mandamus* to compel the telephone company to furnish him a telephone, and the court awarded the writ. The court said: "It is insisted that the conduct of the relator [the refusal of Webster to pay the rent of the telephone which had been removed from his office] now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist. We cannot see that the relations of the parties to each other [growing out of their past transactions] can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone [company] has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong, so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action." This case is decisive of the question under consideration and also disposes of the issue of relator's insolvency tendered by the answer of respondent. In the *Webster Telephone Case* respondent refused to furnish a telephone be-

Bohner v. Bohner.

cause it alleged that Webster was indebted to it for the rent of a telephone previously furnished to and used by him, and which had been removed because of his failure to pay the rent. In the case at bar the Water Company refused to furnish relator water because it alleged that the relator was indebted to it for having turned off the water from his premises while he was in default in paying his water rent. The cost and expense of turning off and on water for a patron enters into and forms a part of the semi-annual water rent paid in advance by such patron under the rules of the company. It would be unjust to permit the Water Company to exact payment for this service a second time. An enforcement of the rule would compel a citizen who had once made a default in his water rent, though he afterwards paid all such rents, to pay a greater price or rate for water than that paid by another citizen for the same water under the same conditions. We reach the conclusion that the respondent in this case has shown no sufficient excuse for not furnishing the relator with water; and that the rule invoked by it to stay the process of the courts is unreasonable and discriminatory in its nature, and therefore void. The judgment of the district court is

AFFIRMED.

IRVINE, C, not sitting.

MARY M. BOHNER V. GEORGE W. BOHNER.

FILED OCTOBER 15, 1895. No. 4919.

1. **Witnesses: HUSBAND AND WIFE.** Except in an action for divorce, and in a criminal proceeding for a crime committed by the husband against her, the wife can in no case testify against her husband. *Greene v. Greene*, 42 Neb., 634, followed.
2. **Crime: DEFINITION.** A crime is a wrong of which the law

Bohner v. Bohner.

takes cognizance as injurious to the public, and punishes in a criminal proceeding in the name of the state.

3. Slander: CHARACTER OF OFFENSE. Verbal slander, though a tort for which an action will lie in behalf of the party slandered is not a crime under our statutes, and a person cannot be punished therefor by a criminal proceeding at the suit of the state.
4. ———: DAMAGES: HUSBAND AND WIFE. Whether an action at law for damages can be maintained by a wife against her husband for verbally slandering her, not decided.

ERROR from the district court of York county. Tried below before BATES, J.

Harlan & Harlan, for plaintiff in error.

Sedgwick & Power, contra.

RAGAN, C.

Mary M. Bohner sued George W. Bohner for damages for slander in the district court of York county. The parties were husband and wife and such fact appeared from the pleadings. A jury was impaneled to try the issues and Mrs. Bohner was called as a witness to testify in her own behalf. The husband objected to his wife being permitted to testify. The court sustained the objection and the wife excepted. Mrs. Bohner then made the following offer: "Plaintiff offers to prove by this witness, Mary M. Bohner, that the allegations and facts set forth in her petition in this case are true, and that the statements therein alleged to have been made by George W. Bohner in the defamation of her character were made as alleged." To this offer the husband of the plaintiff objected. The court sustained the objection and the wife excepted. No other witness was called by Mrs. Bohner, nor did she make any offer to prove the allegations of her petition by any other person whomsoever, and thereupon the jury, in obedience to an instruction of the court, returned a verdict in favor of the defendant, the husband, upon which the court entered a

judgment dismissing the wife's action, to reverse which she has prosecuted to this court a petition in error.

1. The record presents but a single question, viz., whether the district court was correct in refusing to permit Mrs. Bohner to testify. Section 331, Code of Civil Procedure, provides: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." The wife, therefore, was not a competent witness in this action and the court did not err in refusing to permit her to testify. (See, also, *Niland v. Kalish*, 37 Neb., 47; *Skinner v. Skinner*, 38 Neb., 756; *Greene v. Greene*, 42 Neb., 634.)

2. Counsel for Mrs. Bohner seem to be of the opinion that she was a competent witness in the case because slander or defamation of character, being an actionable tort, should be held to be a crime within the meaning of said section 331. But we do not think this contention tenable. "A crime, or misdemeanor, is an act committed or omitted in violation of a public law, either forbidding or commanding it." (2 Blackstone's Commentaries, book 4, p. 3.) In *Re Bergin*, 31 Wis., 386, a crime is defined as follows: "A wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name or in the name of the people or the sovereign." Verbal slander, though a tort for which an action will lie in behalf of the party slandered, is not made a crime under our statutes, and a person cannot be punished therefor by a criminal proceeding at the suit of the state.

3. The case has also been argued here upon the theory that the district court held that a wife could not sue her husband at law for damages for slander; but the record fails to disclose that that question was presented to and passed upon by the district court. The district court ruled,

Hansen v. Kinney.

and properly, that the wife was not a competent witness in the action, as it was against her husband, and as she produced no other witness and offered no other testimony to support the allegations of her petition, there was nothing left for the court to do but to instruct the jury to return a verdict in favor of the husband and to enter a judgment dismissing her action. Whether therefore an action at law for damages for verbal slander can be maintained by a wife against her husband we do not decide. The judgment of the district court is

AFFIRMED.

IDA H. HANSEN V. ALPHEUS A. KINNEY.

FILED OCTOBER 15, 1895. No. 6133.

1. **Review in Absence of Motion for New Trial: EXAMINATION OF PLEADINGS.** Where it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but this court will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had.
2. **Laborers' Liens: SEPARATE CONTRACTS: EVIDENCE.** Where labor is performed for a contractor on an improvement on real estate at two different periods of time, and more than sixty days intervene between the last labor day of the first period and the first labor day of the second period, the presumption is that such labor was performed under two different contracts. *Buchanan v. Selden*, 43 Neb., 559, followed.
3. ———: ———: **CLAIM FOR LIEN: TIME TO FILE.** In such case, to entitle the laborer to a lien under the statute (Compiled Statutes, 1895, sec. 3667) for the labor performed during such first period of time, he must file in the office of the register of deeds a sworn statement of the labor performed and the amount due

Hansen v. Kinney.

him therefor from the contractor within sixty days of the last day on which he labored during such first period of time.

4. **Mechanics' Liens: SEPARATE CONTRACTS: TACKING.** The mechanics' lien law will not be so construed as to enable a laborer to tack one contract to another and procure a lien for all the labor performed under two or more contracts by filing in the office of the register of deeds a sworn statement of the labor performed and the amount due him therefor within sixty days of the date of performing the last labor performed in pursuance of the last contract. *Central Loan & Trust Co. v. O'Sullivan*, 44 Neb., 834, followed.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Calkins & Pratt, for plaintiff in error.

John E. Decker, contra.

RAGAN, C.

Alpheus A. Kinney brought this suit in equity in the district court of Buffalo county against Ida H. Hansen to have established and foreclosed against the latter's real estate a laborer's lien which he alleged he had acquired against said real estate by virtue of having performed certain labor for a contractor who in pursuance of a contract with Hansen had erected certain improvements on said real estate. Alpheus A. Kinney had a decree as prayed, and Hansen has prosecuted to this court a petition in error.

1. Hansen did not file a motion for a new trial. In order for this court to review on error any proceeding had in the trial of an equity case, a motion for a new trial must be filed as in an action at law. (*Carlton v. Aultman*, 28 Neb., 672.) Therefore we cannot look into the bill of exceptions for the purpose of ascertaining whether the findings of fact made by the district court are supported by sufficient evidence, nor review the action of the court in admitting or excluding evidence. In other words, our re-

view of the action of the district court must begin with what occurred, with what the court did, after making its findings of fact. When it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but it will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had. In the case before us the petition of Alpheus A. Kinney states a cause of action and the pleadings in the record support the decree rendered, and had the district court made a general finding only in favor of Kinney and based its decree thereon, the same would have been affirmed. But the district court in this case made special findings of fact. These, because of the absence of a motion for a new trial, must be held to be absolutely correct, and the extent of our inquiry is, did the court reach the right conclusion of law, render the correct judgment or decree, on the facts found?

The facts found by the learned judge are as follows: (a.) Prior to June, 1889, one T. F. Kinney made a contract with Hansen in and by which he agreed to furnish the labor and material and erect for her an improvement on her real estate. (b.) T. F. Kinney employed Alpheus A. Kinney to perform labor on said improvement, and that said Alpheus A. Kinney during the months of June and July, 1889, labored on said improvement twenty-eight days at an agreed price of \$2.50 per day. (c.) That Alpheus A. Kinney performed no other labor on said improvement until the 17th day of October, 1889, on which day he labored thereon six hours. (d.) That on the 14th day of November, 1889, Alpheus A. Kinney filed in the office of the register of deeds of Buffalo county a sworn statement of the labor performed and the amount due him therefor from said contractor for labor performed on the improvement erected un-

Hansen v. Kinney.

der said contract, and claimed a lien on the real estate on which said improvement was situate under section 3667, Compiled Statutes, 1895. And thereupon the district court decreed that Alpheus A. Kinney was entitled to a lien against the real estate of Hansen to secure the payment of said twenty-eight days and six hours labor.

It is to be observed that Alpheus A. Kinney performed labor for the contractor on two different occasions: First, during the months of June and July, when he worked twenty-eight days. Second, on the 17th day of October when he worked six hours. More than sixty days intervened between the 31st day of July, the date on which Alpheus A. Kinney stopped work on the improvement, and the 17th day of October, when he again began work on the improvement. This being the case, the presumption is that the labor performed on the 17th of October was so performed under a separate contract from that under which the labor performed on the 31st of July and prior thereto. (*Buchanan v. Selden*, 43 Neb., 559.) Therefore, to entitle Alpheus A. Kinney to a lien for the labor performed for the months of June and July, he should have filed a sworn statement of the labor performed by him and the amount due him from the contractor therefor and claimed a lien as provided by said section 3667, Compiled Statutes, within sixty days from the 31st of July. The mechanics' lien law should not be so construed as to enable a laborer to tack one contract to another and procure a lien for all the labor performed under two or more contracts by filing in the office of the register of deeds a sworn statement of the labor performed and the amount due him therefor within sixty days of the date of performing the last labor performed in pursuance of the last contract. (*Central Loan & Trust Co. v. O'Sullivan*, 44 Neb., 834.) Under the facts found by the district court Alpheus A. Kinney was entitled to a decree giving him a lien upon the property of Hansen for the value of the labor performed on the 17th day of

Tullock v. Webster County.

October only. The decree of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ALONZO J. TULLOCK V. WEBSTER COUNTY.

FILED OCTOBER 15, 1895. No. 3148.

1. **Bridges: COUNTIES.** Prior to the enactment of chapter 72, Session Laws, 1887, a county under township organization was not invested with the power nor charged with the duty of building or repairing bridges situate in the county. (*Whitcomb v. Reed*, 24 Neb., 50.)
2. ———: ———. By the enactment of said chapter 72 it was not intended to make counties under township organization liable for the payment of bridges already constructed, nor for the payment of repairs made on bridges prior to the taking effect of said act.
3. **Action Against County to Recover for Labor and Material Furnished Under Bridge Contract: PLEADING: ULTRA VIRES.** A petition filed in a suit against a county to recover for labor and material of the value of more than \$100 furnished in 1887 towards the construction of a bridge in pursuance of a contract between the plaintiff and the county board of such county did not allege that the bridge constructed was situate in the county; nor that at the time the contract was made there was on hand money available for the purpose of paying for such labor and material, as provided by section 83, chapter 78, Compiled Statutes, 1887; nor that the county authorities advertised for bids for the furnishing of the labor and material sued for. *Held*, (1) That the petition did not state a cause of action; (2) that these facts must have existed as a condition precedent to invest the county board of said county with jurisdiction to make the contract sued on; (3) that as such facts did not exist, the contract made was *ultra vires* and void and incapable of ratification by the county. *Townsend v. Holt County*, 40 Neb., 852, and *Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala*, 40 Neb., 775, followed and reaffirmed.

Tullock v. Webster County.

ERROR from the district court of Webster county. Tried below before GASLIN, J.

See opinion for statement of the case.

O. P. Mason filed a brief on behalf of plaintiff in error wherein the following points appear:

Municipal corporations have the power to enter into contracts by committees on behalf of the proper officers. (*Hitchcock v. Galveston*, 96 U. S., 348.)

Municipal corporations may ratify unauthorized expenditures which they deem beneficial, and such ratification is equivalent to previous authority. (Dillon, *Municipal Corporations*, sec. 463; *People v. Swift*, 31 Cal., 26; *Kimball v. School District*, 8 Vt., 8.)

Even if there be a defect of power in a corporation to make a contract, yet if the contract was not in violation of its charter or of any statute prohibiting the contract, and the corporation had induced a party who relied on the contract to expend money in the performance of the same on his part, the corporation will be liable. (*City of East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill., 415; *State Board of Agriculture v. Citizens Street R. Co.*, 47 Ind., 407.)

The plaintiff in error having entered into the contract in good faith, and performed the services, relying upon the regularity of the proceedings of the county board, the county, having received the benefit of the performance, is estopped from questioning the regularity in that regard. (*Moore v. Mayor of New York City*, 73 N. Y., 238.)

Where a corporation has purchased chattel property and the property is delivered to it, and all things are completed except the performance of its own promise to pay the price, a plea cannot be entertained that it had no authority to make the purchase, or enter into the contract, so long as it retains and insists on retaining the benefits of the con-

tract. (*Parish v. Wheeler*, 22 N. Y., 494; *Rutland R. Co. v. Proctor*, 29 Vt., 93; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S., 381; *Bank of Columbia v. Patterson*, 7 Cranch [U. S.], 299; *Bank of United States v. Dandridge*, 12 Wheat. [U. S.], 64; *Zabriskie v. Cleveland*, 23 How. [U. S.], 381; *Gold Mining Co. v. National Bank*, 96 U. S., 640; *Pneumatic Gas Co. v. Berry*, 113 U. S., 322.)

It is sufficient that the corporation has made the contract, and by so doing has placed in its corporate treasury the fruits of other's labor, and every friend of justice forbids that it should be permitted to evade payment by an appeal to the limitations upon its manner of doing business. (*Bradley v. Ballard*, 55 Ill., 413; *Darst v. Gale*, 83 Ill., 136; *Poock v. La Fayette Building Association*, 71 Ind., 357; *Hayes v. Gallion Gas Co.*, 29 O. St., 340; *Wright v. Pipe Line Co.*, 101 Pa. St., 204; *Union Nat. Bank v. Hunt*, 7 Mo. App., 42.)

While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the powers of its charter, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, by which they have received the benefit. (*Bissell v. Michigan S. & N. J. R. Co.*, 22 N. Y., 258; *Parish v. Wheeler*, 22 N. Y., 494; *Argenti v. City of San Francisco*, 16 Cal., 256; *Hale v. Mutual Fire Ins. Co.*, 32 N. H., 297; *Railroad Co. v. Howard*, 7 Wall. [U. S.], 413.)

J. N. Rickards, also for plaintiff in error.

J. R. Wilcox, *J. S. Gilham*, and *Case & McNeny*, *contra*, cited: *School District v. School District*, 12 Neb., 242; *Driftwood Valley Turnpike Co. v. Board of Commissioners of Bartholomew County*, 72 Ind., 226; *Cummins v. City of Seymour*, 79 Ind., 497; *State v. Messenger*, 25 Neb., 674; *Sovereign v. State*, 7 Neb., 410; *Smails v. White*, 4 Neb., 357.

RAGAN, C.

Alonzo J. Tullock sued Webster county in the district court thereof, which sustained a demurrer to Tullock's petition. He refused to plead further, whereupon the court entered a judgment dismissing his action, to reverse which he has prosecuted here a petition in error.

The allegations of Tullock's petition necessary to an understanding of the points made here are in substance that on the 16th day of June, 1887, Tullock entered into a contract in writing with Joseph Garber, Alfred McCall, and Reese Thompson, "bridge committee for and in behalf of said Webster county." By the terms of the contract Tullock agreed to furnish the material and labor and construct a bridge for the bridge committee over the Republican river south of Red Cloud and have the same completed by the 1st day of November, 1887. The petition then alleged that Tullock fully performed his contract before the date last mentioned and that "*during the execution of said contract the said defendant, Webster county, directed and required and then and there consented and agreed to pay the said plaintiff for the extra work and material hereinafter more particularly set forth, viz.: That after Tullock had excavated the bed of the river to the first stratum of rock, for the purpose of building the north pier of said bridge according to the plans and specifications made a part of the contract, that Tullock was requested and required by Webster county to make said excavation to the second stratum of rock; that he did so; that Webster county then and there agreed to pay Tullock for the extra work and material required to carry the pier to the second stratum of rock; that said extra labor and material were of the value of \$942.20.*"

Webster county during the entire year of 1887 was under township organization, and at the time the contract for this bridge was entered into by the "bridge committee"

and Tullock, the county was not invested with the power nor charged with the duty of building or repairing bridges in the county. (See *Whitcomb v. Reed*, 24 Neb., 50, where all the statutes bearing on the subject of the duties and liabilities of counties under township organization for the erection and reparation of bridges in the county were examined, and the conclusion stated above reached.) But the legislature, on the 24th day of March, 1887, passed an act (Session Laws, 1887, p. 587, ch. 72) which provided:

"Sec. 1. That in counties under township organization the expense of building, maintaining, and repairing bridges on public roads over streams shall be borne exclusively by the counties within which such bridges are located.

"Sec. 2. The county board of every such county shall build, maintain, and repair every such bridge, and make prompt and adequate provision for the payment of the expense thereof."

The legislature of 1887 adjourned on the 31st day of March of that year, consequently this law did not take effect before the 1st day of July of that year, and there is no allegation in the petition as to the date when Webster county contracted with Tullock to furnish the extra labor and material, nor is there any allegation in the petition showing when he furnished such extra labor and material. The allegation is that the labor and material were furnished at the request of Webster county during the time that Tullock was constructing the bridge; that is, some time between the 16th day of June, 1887, and the time of the completion of the work. This is too indefinite. We cannot presume from this language that the county contracted for nor that Tullock furnished the extra labor and material subsequent to the 1st of July, 1887. The legislature did not intend by the act just quoted to make counties under township organization liable for the payment for bridges already constructed; nor for the payment of repairs made on bridges, which repairs had been made prior to the pas-

Tullock v. Webster County.

sage of the act. The obvious purpose of the act was to put the burden upon the counties instead of the townships, of building and repairing such bridges as might become necessary in the county after the taking effect of the act. But this statute must be construed in connection with sections 83 and 84 of the said chapter 78, Compiled Statutes, 1887, which provided: "All contracts for the erection and reparation of bridges and approaches thereto, for the building of culverts, and improvements on roads, the cost or expense of which shall exceed one hundred dollars, shall be let by the county commissioners to the lowest competent bidder; but no contract shall be entered into for a greater sum than the amount of money on hand in the county road fund derived from the levy of previous years, and two-thirds of the levy for the current year, together with the amount of money in the district road fund of the district where such work is to be performed." Section 84: "Before any contracts, as aforesaid, shall be let, the county commissioners shall advertise for bids therefor," etc.

The petition does not allege that the bridge built by Tullock, and towards the construction of which the extra labor and material sued for were furnished, was in Webster county. It appears from the petition that the value of the extra labor and material was more than \$100; but the petition does not allege that the supervisors of Webster county, before they let the contract to Tullock to build this bridge or to furnish the extra material and labor therefor, advertised for bids; nor does it allege that the amount of money on hand in the county road fund derived from the levy of previous years and two-thirds of the levy for the current year, 1887, together with the amount of money in the district road fund of the district where such bridge was situate was equal to the amount agreed to be paid for such extra labor and material; nor does the petition allege that Tullock was the lowest competent bidder. If the act of March 24, 1887, quoted above, had been in force at the

time Tullock contracted with Webster county to furnish the extra labor and material, still the petition would not state a cause of action because of the absence therefrom of the several matters just enumerated. The advertisements for bids, the fact that the bridge to be built was in Webster county, and the fact that there was on hand money available for the purpose of building and paying for said extra labor and material as provided by said section 83, were facts which must have existed to invest Webster county, or its proper authorities, with jurisdiction to enter into any valid contract for furnishing the labor and material made the subject-matter of this suit. In *Townsend v. Holt County*, 40 Neb., 852, Holt county, through its board of supervisors, duly entered into a written contract with Townsend, in and by which the latter agreed to furnish the material and erect a bridge over the Niobrara river. It appears that the board of supervisors appointed a building committee to supervise the construction of the bridge on behalf of the county. After the contract was made this building committee authorized Townsend to depart from the original plans and specifications for the bridge and to build it higher than Townsend was required to do by his written contract. Townsend made the alterations at an expense of \$500. He then sued the county for the value of this extra labor and material. A general demurrer was sustained to his petition and he prosecuted a petition in error here, but the court held: "Under the provisions of section 83, chapter 78, Compiled Statutes, an increase of \$500 from the contract price for the erection of a bridge cannot be enforced when such increase was contracted for without bids being required or made in respect thereto." We conclude, therefore, that Webster county, by its proper authorities, had no jurisdiction or authority of law to enter into a contract with Tullock to furnish extra labor and material—the cost of which exceeded \$100—towards the erection of the bridge built by Tullock, without there being on hand funds as above stated

and without first having advertised for bids for such extra labor and material. But it is argued here that Webster county, by accepting the bridge and paying Tullock the original contract price thereof, thereby ratified the illegal and unauthorized act of its board of supervisors in contracting with Tullock for the extra labor and material.

The question of the power of a municipal corporation to ratify the invalid contracts of its officers was before this court in *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb., 775. The provision of the statute (Compiled Statutes, sec. 89, ch. 14,) entitled "Cities of the Second Class and Villages" is as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." It appears that the trustees of the village of Ogalalla, or some of them, purchased of the manufacturing company certain hose, hose-carts, reels and ladders, and that the articles purchased were accepted and used by the village; but it further appears that no appropriation for the purpose of purchasing and paying for these articles had previously been made. The village having refused to pay for the fire apparatus, the manufacturing company sued it, and it was argued in this court that the village could not repudiate its contract after having received the benefits thereof; in other words, that by accepting the fire apparatus and using it, the village had thereby ratified the unauthorized contract of its officers in purchasing the apparatus. The court said: "The cases bearing upon the question of the power of municipal corporations to ratify their unauthorized contracts are confusing and apparently irreconcilable. It would subserve no useful purpose to

examine them at length in this connection or to attempt a statement of the grounds upon which they rest. It is sufficient that there is one principle which seems to run through them all, viz.: If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but where the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode. * * * It is plain that the statute under consideration is mandatory and an express limitation upon the powers of cities and villages of the class to which it applies." It was accordingly held that the village was not liable for the apparatus purchased by its officers because no appropriation of money for that purpose had previously been made. This case disposes of the argument made here that Webster county had ratified the unauthorized act of its board of supervisors in contracting with Tullock to furnish the extra labor and material sued for. The authorities of Webster county had no jurisdiction or authority to make this contract without first having advertised for bids therefor and without there being on hand the moneys specified in said section 83, chapter 78, Compiled Statutes, quoted above. The contract, therefore, of the supervisors was not voidable or capable of ratification, but absolutely null and void and incapable of ratification. The judgment of the district court is

AFFIRMED.

JOHN JOHNSON, APPELLANT, V. J. E. BUTT, APPELLEE.

FILED OCTOBER 15, 1895. No. 5382.

1. **Action to Quiet Title: JUDGMENT FOR DEFENDANT.** Evidence held sufficient to sustain the finding of the trial court.
2. ———: **ADVERSE POSSESSION: EVIDENCE.** Occupancy of land by permission of and subservient to the true owner will not establish a title by adverse possession.

APPEAL from the district court of Saunders county.
Heard below before MILLER, J.

Frank Dean, for appellant.

C. Thompson, contra.

IRVINE, C.

This was an action by the appellant against the appellee to quiet title to a tract of land in Saunders county. The plaintiff claimed title by adverse possession only. There was a finding and decree for the defendant. The brief of the appellant does not call attention to any specific errors, but is addressed generally to the argument that the findings were contrary to the evidence. The findings have sufficient support from the evidence on at least two grounds: First, there is sufficient evidence to justify the trial court in finding that there was an interruption of the plaintiff's possession; in other words, that the plaintiff did not show continuous possession for the statutory period. Second, there is evidence justifying the trial court in finding that the plaintiff's possession was not adverse, but was permissive in its character for a portion of the period at least. The evidence we refer to is that the agent of Butt, the true owner, made an arrangement with plaintiff whereby plaintiff was to have the use of the land in consideration of his

Mayer v. Ver Bryck.

paying the taxes thereon, and that plaintiff's occupancy was by virtue of that arrangement; that is, as a tenant of Butt, and not as one holding adversely to him. Such a permissive occupancy does not establish title by adverse possession. (*Smith v. Hitchcock*, 38 Neb., 104).

JUDGMENT AFFIRMED.

THEODORE MAYER V. J. A. VER BRYCK.

FILED 'OCTOBER 15, 1895. No. 5366.

1. **Quantum Meruit: SPECIAL CONTRACT: PLEADING.** On a petition alleging merely a special contract and performance by the plaintiff, the plaintiff cannot recover on a *quantum meruit* for part performance. *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339, followed. *West v. Van Pelt*, 34 Neb., 63, distinguished.
2. **Sales: CONTRACTS: TENDER OF DELIVERY.** On a contract for the delivery of goods the vendee is not entitled to recover where delivery was tendered at the time for performance and the tender kept good till the trial.

ERROR from the district court of Harlan county. Tried below before GASLIN, J.

John Everson, for plaintiff in error.

W. M. Morning, contra.

IRVINE, C.

This was an action by Mayer to recover for services alleged to have been performed for Ver Bryck as a real estate broker. There was a verdict and judgment for the defendant, a reversal of which is sought by the plaintiff.

The plaintiff requested the following instruction, which was refused: "If you find that defendant Ver Bryck re-

Mayer v. Ver Bryck.

quested plaintiff Mayer to assist in the sale of defendant's property, described in the petition of plaintiff, and that plaintiff Mayer did assist in said sale, even if plaintiff did not wholly procure said purchaser, still, if plaintiff Mayer, at the request of defendant Ver Bryck, assisted in procuring the sale, he is entitled to what his services are reasonably worth, and your verdict must be for plaintiff." The refusal of this instruction is assigned as error. The plaintiff also requested the following instruction: "The jury are instructed that if you find from the evidence that the defendant Ver Bryck requested the plaintiff to procure a purchaser for the brick store described, and in pursuance thereof the said plaintiff Mayer procured a purchaser, with whom defendant J. A. Ver Bryck afterwards negotiated a sale himself, nevertheless the said plaintiff Mayer would be entitled to recover, and you will find for the plaintiff." This the court gave, adding the following modification: "Provided plaintiff found a purchaser and effected a sale, and defendant promised to pay said plaintiff \$50 therefor, as averred in the petition." The modification of this instruction is assigned as error. These two assignments may be treated together.

The plaintiff contends that the law is as stated in the instructions requested without modification, and cites in support of that contention a number of decisions of this court. The question must, however, be determined as one rather of pleading than of substantive law. The petition is as follows: "On or about the — day of January, 1890, the defendant requested plaintiff to find him a purchaser of lot 2, in block 16, in First Addition to Alma, Nebraska, on terms fixed by the defendant, and agreed to pay plaintiff for his services, and as compensation for finding said purchaser and making said sale the sum of \$50. On or about the — day of —, 1890, this plaintiff found a purchaser for said premises for said defendant and sold said premises to him on terms fixed by defendant, whereby said defend-

ant became indebted to plaintiff in the sum of \$50. No part of said sum has been paid and there is now due from defendant to this plaintiff the sum of \$50, for which sum, with costs, plaintiff asks judgment." There is no count upon a *quantum meruit*. The plaintiff pleaded a special contract that he should receive \$50 as compensation for finding a purchaser and making a sale, and the court did not err in refusing to permit the jury to base its verdict upon a *quantum meruit*, which was the effect of refusing the instructions as asked. Most of the cases cited do not tend to support the plaintiff's contention that he was entitled to recover on a *quantum meruit* under the pleadings. Nearly all the cases cited by him state only the rule determining the broker's right to recover. No question of pleading was presented in those cases, and the petition, where its nature is disclosed, was upon a *quantum meruit*. In *Gregg v. Loomis*, 22 Neb., 174, it is intimated that the evidence introduced to show that the broker had procured a purchaser who had thereafter effected a purchase from the owner directly was not admissible under the pleadings; but even in that case the opinion discloses that the petition counted on a *quantum meruit*. In *West v. Van Pelt*, 34 Neb., 63, a broker to procure a donation of land was permitted to recover on a *quantum meruit*, under a petition alleging merely a special contract; but this was because the court considered that the pleadings contained sufficient averments of a waiver of full performance to justify a submission to the jury. In no case has the court held that where the pleadings allege a special contract only, the plaintiff can recover without showing performance upon his part. To recover upon a part performance, or to recover on a *quantum meruit*, facts justifying such recovery must be pleaded. (*Powder River Live Stock Co. v. Lamb*, 38 Neb., 339.)

The defendant denied the employment of plaintiff, but admitted that after the sale was effected he promised to give

Mayer v. Ver Bryck.

the plaintiff a suit of clothes. He then pleaded that he had offered him the suit of clothes, and that he tendered it in court. The plaintiff asked the court to instruct the jury, in effect, that if the agreement was to pay the plaintiff in goods, and if the defendant had failed to do so, then the plaintiff would be entitled to recover the value of the goods in money. The refusal of this instruction is assigned as error. The evidence was undisputed that the defendant tendered a suit of clothes to the plaintiff. The plaintiff swears that he refused it because defendant promised him a tailor-made suit worth \$50, and he was tendered a ready-made suit worth much less. It may be that if the plaintiff had requested an instruction submitting to the jury this issue, he would have been entitled to it; that is, that if defendant had agreed to supply the plaintiff with a tailor-made suit worth \$50, and had tendered a less valuable ready-made suit, this would be a failure to deliver the goods according to the contract, and would entitle the plaintiff to recover in money the value of the suit which should have been delivered. But the instruction asked did not so submit the question. Under the instruction, as requested, the jury would have been required to find for the plaintiff for the value of the suit in money, although they found the agreement to be as the defendant contended, to deliver a ready-made suit such as the defendant tendered, and which, if necessary to avoid error, we must assume to have been tendered in court in accordance with the answer. It is clear that if the defendant only agreed to give such a suit as he offered to the plaintiff, and if on the trial he tendered that suit anew, the plaintiff would not be entitled to recover.

It is assigned that the verdict is not sustained by the evidence. We have examined the evidence and find it sufficient.

JUDGMENT AFFIRMED.

CLARENCE A. POWELL V. LUEVA YEAZEL, ADMINIS-
TRATRIX OF ABRAHAM YEAZEL, DECEASED, ET AL.

FILED OCTOBER 15, 1895. No. 5469.

1. **Fraudulent Conveyances: EVIDENCE OF GOOD FAITH: INSTRUCTIONS.** In a contest between a vendee of chattels and creditors of one under whom he claims title the evidence tended to show a purchase for value and in good faith. *Held*, Error for the trial court in the instructions to characterize the sale as a "pretended sale."
2. **Sales: POSSESSION OF GOODS: BURDEN OF PROOF.** The failure of a vendee of chattels to take possession thereof does not render the sale conclusively void as against creditors. It merely casts upon the vendee the burden of proving his good faith.
3. ———: ———: **REPLEVIN: ATTACHMENT: INSTRUCTIONS.** Therefore it is error to instruct the jury that such a vendee cannot recover in replevin from an officer attaching the goods as the property of the vendor if the vendee did not obtain possession before the levy of the writ, although he had no notice of the vendor's fraudulent intent.

ERROR from the district court of Adams county. Tried below before CHAPMAN, J.

Capps & Stevens, for plaintiff in error.

Batty & Dungan, contra.

IRVINE, C.

This action was one in replevin by Powell against Yeazel, R. A. Boyd, Fred Einspahr, and George Crane. It was begun before a justice of the peace, and the property involved being appraised at an amount beyond the jurisdiction of the justice, the case was certified to the district court. After a verdict there for the plaintiff, a motion for a new trial having been sustained, amended pleadings were filed and the case again tried, resulting in a verdict and judg-

ment for the defendants. The property in controversy consisted of forty-four hogs and about twenty head of cattle. The plaintiff claimed this stock by purchase from Anna D. Einspahr. Crane was the sheriff of Adams county and Boyd his deputy. They justified under a writ of attachment sued out by Yeazel against Herman D. Einspahr, the husband of Anna D. Einspahr, claiming to have levied upon the stock by virtue of that writ. The relation of Fred Einspahr to the case seems to be that it was claimed that he had been made custodian of the stock by the deputy sheriff at the time of the levy. The evidence tends to show that the property, prior to January, 1890, belonged to Herman D. Einspahr; that the latter part of January, Einspahr, by bill of sale, conveyed it to his wife. On the one side it is contended that this attempted conveyance was in fraud of Einspahr's creditors. On the other side it is contended that Einspahr being indebted to the Exchange National Bank of Hastings in a large amount and also to Yeazel, its cashier, Yeazel, for the bank and himself, was endeavoring to obtain security for this indebtedness. There is evidence tending to show that certain security was already held, but the details as to this feature are not important, because the effort was being made to obtain a change in the form of the security and also additional security. The security desired was a mortgage on the real estate of Einspahr, including his homestead. In order to procure Mrs. Einspahr's execution of this mortgage, and in consideration of her executing the same, a large amount of personal property, including the live stock in controversy, was transferred to her, and this, it was claimed, was done with the knowledge and consent of Yeazel. It was further contended that on the 6th day of February, 1890, the plaintiff agreed to purchase the live stock in controversy, dealing with Einspahr, and at that time not knowing of Mrs. Einspahr's claim to the property. No sale was then consummated sufficient to answer the re-

quirements of the statute of frauds; but on the following day, February 7, the sale was perfected by the plaintiff's drawing and delivering to Mrs. Einspahr his check for \$940, the contract price. The check was delivered between 5 and 6 o'clock of the afternoon of February 7, and was subsequently paid to Mrs. Einspahr. On the 8th most of the hogs were taken into possession by the plaintiff and driven to Kenesaw. At 3 o'clock in the afternoon of the 7th, as shown by the return of the order of attachment, the sheriff attempted to make a levy on the property. The stock was then on the farm of Einspahr. There is evidence tending to show that the levy was regularly declared, but the stock was not moved off the place. Fred Einspahr, who lived on an adjoining farm, was requested by the deputy to take charge of the stock. He objected on the ground that his father was lying ill at his home, and he could not leave; but he was told, as his place was near the stock, he could "keep an eye on it," and prevent others from intermeddling. Herman Einspahr's employes were at the same time directed to feed the stock. On the 8th the sheriff caused the hogs to be returned from Kenesaw to Einspahr's place. On that day the plaintiff was driving the cattle toward Kenesaw when he met the sheriff, who took them out of his possession. There is no evidence that the plaintiff had any actual knowledge of the levy until on the 8th, on his way to take the property into his possession, he was informed by Fred Einspahr that a levy had been made the previous day.

It will be observed that the salient questions in the case are, first, the validity of the levy; second, the *bona fides* of the conveyance from Einspahr to his wife, and third, the *bona fides* of the sale by Mrs. Einspahr to the plaintiff. There was undoubtedly evidence sufficient to go to the jury on the last two issues. It is contended by the plaintiff that the evidence was insufficient to establish a valid levy of an attachment. The record before us does not con-

tain all the instruments which the bill of exceptions shows were offered in evidence, and as the judgment must on other grounds be reversed, we pass this question, simply remarking that this court has held that where an officer attaches property found in the possession of a stranger claiming title, in an action of replevin therefor by such stranger the officer, in order to justify, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued (*Williams v. Eikenbery*, 25 Neb., 721; *Paxton v. Moravak*, 31 Neb., 305), and also that the test of the validity of a levy upon personal property is whether or not the acts of the officer under his writ have been such as would make him liable as a trespasser, but for the protection afforded by the writ. (*Grand Island Banking Co. v. Costello*, 45 Neb., 119.)

At the request of the defendants the following instruction was given: "You are instructed as a matter of law that if from the evidence you will find that at the time of the pretended sale of the property in controversy by Herman Einspahr to Anna Einspahr and by her to this plaintiff, there was no immediate delivery to either of them followed by an actual and continued change of possession, and you find that said pretended sale was made with the intention on the part of Herman Einspahr and Anna Einspahr to defraud the creditors of Herman Einspahr, though said fraudulent intent was not known to or participated in by the plaintiff herein, the sale is void as to creditors and you must find for the defendant, unless you further find that plaintiff purchased said property and received possession then or prior to the levy of the attachment, or unless you find that Abraham Yeazel consented to and agreed that such sale and transfer should be made in consideration of Anna D. Einspahr's executing the conveyances referred to in these instructions." We think the learned district judge gave this instruction without sufficiently observing the language

in which it is couched. It is, we think, in two respects erroneous to the prejudice of the plaintiff. It twice characterizes the sales from Einspahr to his wife and from her to the plaintiff as "pretended" sales. The word "pretended," used in such a connection, signifies something falsely assumed; something claimed contrary to the truth of the matter. The jury could not have understood it in any other sense. As we have said, there was evidence justifying the jury in finding that both sales were *bona fide*, and the court should not have used language importing an assumption that they were not so. In the next place the jury was told that if the sale was made with the intention on the part of either Einspahr or wife to defraud the creditors of Einspahr, the plaintiff could not recover even though he did not know and did not participate in such intent, unless he actually received possession of the property before the levy was made. We take it that the levy of an attachment upon personal property, like a levy upon real estate, attaches only to the debtor's interest therein. A sale of personal property may be effectual even when over the value of \$50, not only by the delivery of possession of the property, but by payment of the purchase money or some portion thereof, or by a memorandum in writing. The evidence raises some doubt as to the priority in time between plaintiff's payment for the stock and the levy of the attachment. Assuming a levy to have been made, the fact that plaintiff did not receive possession until later would not necessarily defeat his right. The failure of the plaintiff to obtain possession would in a contest between him and creditors of the vendor affect only the burden of proof. (*Fitzgerald v. Meyer*, 25 Neb., 77.) A sale unaccompanied by a change of possession is not conclusively void as against creditors of the vendor. It only casts upon the vendee the burden of proving his good faith, and Powell might be a purchaser in good faith and entitled to the property as against creditors of Einspahr even if the transfer from

Smith v. Brown.

Einspahr to his wife were voidable, and although he did not obtain possession of the property before the levy was made.

REVERSED AND REMANDED.

JOHN SMITH V. ELIZA BROWN.

FILED OCTOBER 15, 1895. No. 5404.

1. **Admission of Evidence: ESTOPPEL.** A party who asks his adversary to offer in evidence a written instrument of doubtful competency cannot be heard to urge in this court, when the instrument was immediately offered, that it should have been excluded as incompetent.
2. **Sales: CONTRACT FOR MEASUREMENT OF PROPERTY: EVIDENCE OF WEIGHT.** Where hay was sold with the understanding that 420 cubic feet were to be computed as a ton, evidence to show that the actual weight of such a volume of hay was less than a ton was properly excluded.
3. **Instructions.** Certain rulings of the court in giving and refusing instructions presenting no legal questions of general interest examined, and *held* not erroneous.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Ricketts & Wilson, for plaintiff in error.

Charles E. Magoon, *contra*.

IRVINE, C.

Eliza Brown sued John Smith to recover \$84 as the purchase price of five stacks of hay which she alleged she had sold and delivered to Smith on a special contract that he should pay therefor that price. Smith defended on the ground that he had bought three of the stacks by the tou;

that two small stacks he bought in bulk for the price of \$9, and that he had taken half a ton, in value \$2, from one of the larger stacks; that Mrs. Brown had falsely represented to him that the largest stack contained fourteen tons and the other two not purchased in bulk, eight each, whereas in fact the said three stacks really contained but eighteen tons; that after discovering the falsity of the representations he had tendered Mrs. Brown \$11 for the hay received and had refused to take the remainder. The reply was a general denial. There was a verdict for the plaintiff for the full amount claimed.

F. M. Glenn was called as a witness to prove the quantity of hay. After testifying that prior to the sale to Smith he and another had measured the hay in the stacks, he was interrogated as to the method pursued in making the measurement. He produced certain memoranda which he testified were made at the time the measurements were taken. These were offered in evidence and their admission is assigned as error on the ground that they were not such accounts as are admissible under the statute. This is true. Their office was only as memoranda for the purpose of refreshing the witness' memory. We need not inquire whether or not there was a proper foundation for the admission of the memoranda themselves, because immediately before they were offered in evidence the witness was interrogated in such a manner as to call upon him to testify in regard to the facts. Whereupon, to quote the bill of exceptions, "Counsel for the defendant here asks that the memorandum shall be introduced in evidence and not the witness' statement of what it shows, because the method of arriving at it is the material thing." The plaintiff then offered in evidence the memoranda. The defendant objected to their admission. The objection did not go to any particular features disclosed by the memoranda themselves, but to the general question of their competency as evidence. As they were offered at the suggestion and upon the re-

Smith v. Brown.

quest of defendant he cannot be heard to object to their introduction.

An effort was made, after proving that the hay to which the controversy related was a portion of a crop of hay grown on the land where it was stacked, and stacked in a number of different stacks of the same general contour, to show that other stacks of this character had been purchased by another witness, and that when the hay contained therein was weighed it did not weigh as much as indicated by Mrs. Brown's measurements, under which both sales had been made. The exclusion of this evidence is assigned as error. Disregarding the tendency of this evidence if admitted to introduce into the action the trial of collateral issues, it was properly rejected on another ground. It is undisputed that both parties contemplated a sale, not by actual weight, but by measurement, and about the only fact on which all witnesses substantially agreed is that in the purchase of hay in this manner 420 or 421 cubic feet are calculated as constituting a ton. It was by the ton as so measured, and not by weight, that this hay was sold, and the evidence shows that the actual weight of 420 cubic feet of hay differs according to the season, quality, and other conditions. It was, therefore, wholly immaterial whether the hay weighed as many tons as the stacks by measurement were calculated to contain. There is no statute fixing the volume of a ton of hay. There is a statute fixing the weight of certain articles measured by bushels. (Compiled Statutes, 1895, sec. 5, ch. 94.) "A bushel of each of the articles enumerated in this section shall consist of the number of pounds respectively affixed to each, viz.:" Then follows a list of articles, and in that list we find "hay, per ton, 2,000 pounds." There is nothing here to establish any standard of comparison between the volume and the weight of hay, and we know no reason why the parties may not conventionally, either by express agreement or by established custom, deal in hay according to any arbitrary calculation of

the volume requisite to constitute a ton, regardless of the actual weight. This is what was here done.

The defendant in error requested the following instruction: "The parties to this action agree that 420 cubic feet of hay constitute a ton by measurement, and you are instructed that the rule adopted by plaintiff and her son of multiplying the length and width of stack together and this product by one-third of the length of a line from the bottom of a stack on one side over the top and to the bottom of the stack on the other side does not give the cubic contents of such stack, and hence would not form a correct dividend to divide by 420 cubic feet, the contents of a single ton. This being the rule employed by plaintiff in the measurement of this hay you are instructed that such measurement was erroneous." Its refusal is assigned as error. The court of its own motion gave this instruction: "The evidence shows that it was the intention of the parties to this action at the time they entered into the contract in relation to the hay in question, that 420 cubic feet of hay would constitute a ton by measurement. You are instructed that the rule adopted by the plaintiff and her son of multiplying the length and width of the stack together and this product by one-third of the length of a line from the bottom of the stack on one side over the top and to the bottom of the stack on the other side, would not in all cases give the cubic contents of a stack of hay, and whether or not it would give the true contents of the stack in cubic feet in this particular instance is for you to determine." The difference in these instructions is only that by that requested the jury was positively instructed that the method of measurement resorted to was incorrect, while by that given the jury was cautioned that it would not be in all cases correct and that they should determine whether or not it was correct in this case. It is clear that the cubic contents of the stack would not be accurately ascertained by that method unless its cross-section was a perfect square. There is in the evi-

Smith v. Brown.

dence nothing to show the contour of the stacks in question, the nearest approach to testimony on this subject being that of a witness for the plaintiff in error who testified that one of the stacks was ten feet wide and "squared five feet high." But it further appears from his testimony that the section of the stack was not rectangular and that his statement that it would square five feet high was based merely on a rough estimate obtained by observation assisted by rude measurements. The remainder of this witness' testimony was not of a character calculated to impress one with his accuracy as a mathematician, although his father testified that the witness referred to was relied on to make the estimate, stating, as a reason, that he "was accurater at figures than I was,"—proof as to the competency of this witness as an expert which was somewhat weakened by the father's further testimony, that "I ain't so accurate in figures as some men." Indeed the great difficulty which counsel seem to have had in the trial of the case was with the testimony of some of these expert geometers, the testimony of one of whom discloses that he was firmly convinced that the proper method to ascertain the area of a semicircle was to multiply the diameter by a third of the circumference. Speaking more seriously, there is absolutely no evidence in the record from which the actual cubic contents of the hay stacks can be ascertained with any degree of accuracy. In view of the pleadings and the evidence as to the contract between the parties the burden of proof devolved upon the plaintiff in error to show that the stacks contained less than was represented. Under this condition of the record we do not think that the plaintiff in error can complain because the court left the whole matter to the jury.

It is also contended that the court erred in giving to the jury an instruction to the effect that fraud is never presumed, but must be established by proof, like any other fact. The criticism of this instruction is that it implied that the plaintiff must recover, unless an actual design on the part of de-

fendant was shown to deceive the plaintiff. In at least three other instructions the jury was told in effect that if the representations were made under circumstances entitling the defendant to rely thereon, and if they were in fact false, the plaintiff could not recover. These instructions were certainly of such a character that the jury could not have inferred that an actual intent to deceive was necessary.

Complaint was made of another instruction, whereby the jury was told that if the defendant purchased the hay with full knowledge of the manner in which it had been measured, then he would be bound by the measurement, even though it might be incorrect. This was coupled with an instruction to the effect that if the defendant was ignorant of the business concerning which he contracted and was not acquainted with the measurement of hay in the stack, then plaintiff must answer for her failure to impart any special knowledge which she possessed. Taking these two instructions together we think they fairly stated the law. If both parties were equally conversant or equally ignorant of the method employed in the measurement of hay stacks and contracted for the purchase and sale of the hay, as measured according to a particular method, the method pursued being known to both, then the contract amounted to nothing more than an agreement to take the hay as so estimated, without regard to the accuracy of the estimate. Under such circumstances neither party could rescind on ascertaining that the method pursued was not accurate. This and another instruction are also objected to on the ground that they were not applicable to the evidence. An examination of the evidence convinces us that this objection is not well taken.

JUDGMENT AFFIRMED.

JOSEPH LAMMA v. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1895. No. 6288.

1. **Arrest and Detention of Felons: HOMICIDE: DUTY OF SHERIFF.** A sheriff or other police officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life; but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of at least manslaughter.
2. ———: ———: **EVIDENCE.** *Held*, That a conviction of manslaughter is sustained by the evidence.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

The facts are stated in the opinion.

C. W. McNamar, for plaintiff in error, in support of an argument that the evidence is insufficient to sustain the verdict, cited the following authorities: *Bruner v. State*, 58 Ind., 159; *Dressen v. State*, 38 Neb., 375; *State v. Dierberger*, 96 Mo., 667; *Jackson v. State*, 5 So. Rep. [Miss.], 690; Wharton, Criminal Law, sec. 933; *State v. Sloan*, 47 Mo., 604.

F. G. Hamer and *H. M. Sinclair*, also for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state:

The facts do not present a case of justifiable homicide. Under the evidence the plaintiff in error is at least guilty of manslaughter. (Wharton, Criminal Evidence, sec. 836; *United States v. Ross*, 92 U. S., 283; *Head v. Martin*, 3 S. W. Rep. [Ky.], 623; 2 Bishop, Criminal Law, 662, 663; *Commonwealth v. York*, 50 Mass., 93; *Clements v.*

State, 50 Ala., 117; *State v. Bland*, 97 N. Car., 438; *State v. McNinch*, 90 N. Car., 696.)

NORVAL, C. J.

An information in due form was filed in the district court of Dawson county by the county attorney, charging Joseph Lamma, the plaintiff in error, with murder in the first degree, for the killing of one George Rogers on the 1st day of November, 1892. To the charge the accused entered a plea of not guilty. A trial was had, and the jury being unable to agree they were discharged. Subsequently the place of trial was changed, on application of the prisoner, to Buffalo county. The accused was again placed upon trial in the last named county, which resulted in a conviction of manslaughter. The court overruled a motion for a new trial, and sentenced the prisoner to imprisonment in the state penitentiary for the period of eighteen months. He has prosecuted a petition in error to this court to obtain a review and reversal of this judgment. The petition in error contains eighteen assignments, but two of which are relied upon in the briefs for a reversal, which we will proceed to examine.

In the outset it should be stated that the killing is admitted. The defense interposed is justifiable homicide. It is argued that the court erred in failing to instruct the jury that the burden of proof was upon the state to establish that the homicide was not justifiable. There are two answers to this contention. In the first place, no request to charge the jury was submitted by counsel for the accused. Had such an instruction been tendered and refused, then the action of the trial court could have been reviewed. The question discussed is not presented by the record. Again, the court in its charge, after fully and fairly stating the rule of justifiable homicide as applicable to the facts disclosed by the evidence, told the jury if from the evidence they entertained a reasonable doubt of the

Lamma v. State.

guilt of the defendant of either of the offenses charged in the information, it was their duty to return a verdict of acquittal, which direction was, in effect, that the burden was upon the state to prove that the killing was not justifiable, not by a preponderance of the evidence merely, but beyond a reasonable doubt. The instructions given fully covered the point.

The other assignment relied upon in the brief is that the evidence is insufficient to sustain the verdict. The record shows that the plaintiff in error at the time of the homicide was the deputy sheriff of Dawson county, and was in charge of four persons confined in the county jail. George Rogers, the deceased, was an inmate of the jail, awaiting trial on the charge of horse stealing. Joseph Smith was janitor at the court house, one of his duties being to carry the meals to the prisoners in the jail, which is in the basement of the court house. On the evening of the 1st of November, 1892, Smith carried to the jail the suppers for the prisoners, unlocked the door to the outside entrance to the jail, passed through the same and down a hall through a doorway to the right into a room about 14x17 feet, and from here to a grated door between this room and a large room termed the "cell room," where the prisoners were confined. The buckets containing the evening meals were set upon the floor near the side of this door, and Smith thereupon unlocked and opened the iron-grated door. Rummel, one of the prisoners, then came forward, and stooped down to get the meals, whereupon, Rogers, the deceased, jumped over Rummel, knocked Smith back against the wall, and ran towards the outside door, Smith crying, "Help! Help! Murder!" About the same instant Lamma reached the outside entrance to the jail from the street, and, observing Rogers coming, said "Halt! Halt!" and shot the deceased, the ball entering the left breast a little to the right and about two inches below the left nipple and lodging between the spine and the shoulder blade. From the effects of the

Lamma v. State.

wound Rogers expired in a very few moments. The state introduced testimony tending to show that the prisoner Rummel, some hours before the killing, told the accused to keep a better watch upon Rogers as he was going to try to get away, and to this Lamma replied: "Let the son of a bitch come on. I want a shot at him." The only question presented is whether, under the foregoing facts, the plaintiff in error was justified in taking life in order to prevent the escape of the deceased.

The law governing the taking of human life by officers of justice is thus stated by Carlton, Homicide, section 528: "In cases of felony the killing is justifiable before an actual arrest is made, where in no other way the escaping felon can be taken. In such cases, that is to say in cases of felony, if the felon flees from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, when he cannot otherwise be taken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case, without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it was done of necessity or not." In *State v. Bland*, 97 N. Car., 438, the court say: "The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine from the testimony the existence or absence of the necessity." (See, also, *Jackson v. State*, 66 Miss., 89; *Jackson v. State*, 76 Ga., 473; Crocker, Sheriffs, secs. 940, 941; Murfree, Sheriffs, secs. 11-64.) The rule deducible from the authorities is that a sheriff or other officer, in arresting or preventing the escape of a person charged with a felony, may use such force as is reasonably necessary, even to the taking of life;

Olsen v. Meyer.

but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of at least manslaughter. Applying this doctrine to the case at bar, can there be any room for doubt that the killing of Rogers was inexcusable? We think not. The deceased was within the walls of the jail and, so far as the evidence shows, was unarmed. His escape could have been prevented by Lamma by the closing of the outside door. While the deceased was called to "halt," the record fails to show that he did not comply with the request. For aught that appears in the testimony the fatal shot may have been fired after the deceased had stopped. It is also undenied that the accused had been apprised that Rogers was contemplating an escape. Lamma could have taken steps to have prevented his doing so by putting him in a cell, or otherwise securing him; but he did nothing of the kind. He should have exhausted every resource at his command to prevent the escape before taking human life. Upon this record we are fully satisfied that the jury were warranted in finding that the killing of Rogers was not justifiable. The judgment is

AFFIRMED.

CHARLES H. OLSEN, ADMINISTRATOR, v. MAX MEYER.

FILED NOVEMBER 6, 1895. No. 5416.

1. **Negligence: DEATH CAUSED BY FALLING WALL: EVIDENCE OF SEVERITY OF STORM.** In an action for negligently permitting a brick wall to remain unsupported, in consequence of which it fell upon and killed the plaintiff's intestate, the defense alleged being that the falling of said wall was occasioned by a wind storm of such unusual force and severity as to be denominated as the act of God, *held* not error to permit the introduction by the defendant of evidence tending to prove that there

had been since the date in question (two years, three months, and twenty-three days) no storm of equal severity.

2. ———: ———: ———. Evidence examined, and *held* to sustain the judgment of the district court.
3. **Measure of Damages: INSTRUCTIONS: REVIEW.** This court will not consider objections by the plaintiff below to instructions relating to the measure of damage where he has failed to recover on the cause of action alleged.

ERROR from the district court of Douglas county.
Tried below before IRVINE, J.

Schomp & Corson, for plaintiff in error.

W. J. Connell, Charles Ogden, and J. W. West, contra.

Post, J.

This was an action in the district court for Douglas county by the plaintiff in error, as administrator of the estate of Edward Olsen, deceased, to recover from the defendant in error, Max Meyer, on account of the negligence of the latter which caused the death of the plaintiff's intestate. A trial was had resulting in a verdict and judgment for the defendant below, which has been removed into this court for review upon allegations of error by the plaintiff.

It is in the petition, in substance, alleged that the defendant Meyer is the owner of a lot at or near the intersection of Eleventh and Farnam streets in the city of Omaha, on which was situated a large, three-story brick building, adjacent to which was a one-story wooden building owned and occupied by the deceased as a business house. On the 10th day of January, 1889, the interior of the defendant's building was destroyed by fire, leaving the walls thereof unsupported, in which condition they were exceedingly dangerous and a constant menace to the lives and property of people in the immediate neighborhood thereof. On the 4th day of February, following, one of said walls,

Olsen v. Meyer.

which the defendant had negligently permitted to remain in its aforesaid dangerous condition, fell outward upon the wooden building above mentioned, crushing it to the earth and instantly killing the plaintiff's said intestate. The answer admits ownership by the defendant of the building in question and the death of the said Edward Olsen, but denies the allegation of negligence and charges that the falling of the wall aforesaid was caused by a storm of such unusual force and severity as to be denominated the act of God, and that the defendant is in nowise answerable for the fatal consequence thereof. The reply is in effect a general denial.

At the trial below, on the 27th day of May, 1891, the defendant, to sustain the allegations of his answer respecting the character of the storm which resulted in the death of the plaintiff's intestate, was permitted to prove by witnesses called for that purpose that the city of Omaha and vicinity had not since the time in question, to-wit, February 4, 1889, been visited by a wind storm of equal force and violence. To the introduction of such evidence exception was taken on the ground that the character of storms occurring subsequent to that which produced the fatal result above stated cannot be taken as a basis of comparison for the purpose of the defense alleged, or, to state the objection in the language of plaintiff's counsel, "The character of the wind or of wind storms that occurred after that date could have no bearing whatever upon this case, and were clearly irrelevant and immaterial." We are unable to perceive the force of the objection urged. It was, as stated in the charge of the court, the duty of the defendant "to take into consideration the effect of such winds and other natural phenomena as are ordinarily liable to occur, having due regard for the condition of the building and the season of the year, but he was not required to guard against an extraordinary manifestation of nature, the occurrence of which could not reasonably have been antici-

pated or foreseen." According to the modern understanding of the law, we are not required to seek for a precise definition of the term "act of God," but rather to ascertain the kind or character of events which are within the contemplation of the parties, or which may be reasonably anticipated to occur (Pollock, *Contracts*, p. 366*), and in the determination of that question it is certainly proper to avail ourselves of human observation and experience both prior and subsequent to the particular event involved, the weight or probative force of such evidence depending upon the length of time to which the comparison applies. Evidence of the character objected to is not admissible merely, but must, for obvious reasons, become in course of time the necessary and only basis of comparison. The objection is not directed to the length of time intervening between the falling of the wall and the date of the trial—two years, three months, and twenty-three days—but to any period subsequent to the fatal accident for the purpose of the comparison. It follows that the objection was rightly overruled.

It is next urged that the verdict is against the decided weight of the evidence and should have been set aside upon that ground. We observe from the record that on the day succeeding the fire the defendant consulted Mr. Mendelsohn, a competent and experienced architect, with regard to the repairing of the building mentioned, and was advised by the latter, after an examination of the walls, that they were not damaged, that they might be used for the purpose of rebuilding, and that they were perfectly safe as they then stood. Said architect was instructed to prepare plans and specifications for the necessary repairs, in which he was employed at the time of the accident. The defendant, according to his own testimony, acted in good faith, relying upon the advice thus promptly sought and given, in which he is fully corroborated by Mr. Mendelsohn. We cannot on this record say that the jury were not warranted in find-

Bryant v. Thesing.

ing for the defendant upon the issue of negligence, the vital question of the case.

Exception was taken to the refusal of certain instructions asked by the plaintiff, but as they relate to the question of the measure of damage, they will not be examined, since their refusal could in no event amount to prejudicial error. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

ARTHUR BRYANT V. RICHARD THESING.

FILED NOVEMBER 6, 1895. No. 5518.

1. **Written Contracts to Purchase: PAROL AGREEMENTS TO RELEASE PURCHASER.** A party who has contracted for the purchase of property may be released from the obligations of the contract at any time while it remains wholly executory, by a subsequent parol agreement to that effect.
2. ———: ———: **CONSIDERATION.** The mutual waiver of the rights of the parties to a contract of sale of personal property is sufficient consideration for a cancellation of the contract, to release the parties from their obligations thereunder.
3. **Sales: ACTIONS FOR PURCHASE PRICE: QUALITY OF STOCK.** Where a seller of nursery stock institutes an action to recover the purchase price thereof the defendant may show that the stock was not of the kind and quality ordered, although he did not refuse to receive it for that reason when it was tendered to him at time of delivery, but based his refusal upon a cancellation or discharge of the order of purchase.
4. ———: ———: ———. An order for nursery stock of a certain kind or quality, the price for the whole being stated in the order in a lump sum, is not severable, but entire, and the maker of the order is not obliged to receive the stock if in whole or in a substantial or material portion it is not of the kind or quality ordered.

5. ———: WRITTEN ORDERS FOR GOODS: PAROL EVIDENCE. A representation or promise by which a party was induced to sign a written order of purchase of property may be proved by parol.
6. INSTRUCTIONS: OBJECTIONS: REVIEW. Objections to instructions examined, and *held* not tenable as to some, and in regard to others the errors complained of were not prejudicial.

ERROR from the district court of York county. Tried below before WHEELER, J.

See opinion for statement of the case.

Harlan & Harlan, for plaintiff in error :

The contracts and orders were in writing and should control. They cannot be contradicted by oral testimony. (*Zucker v. Karpeles*, 50 N. W. Rep. [Mich.], 373; *Strange v. Wilson*, 17 Mich., 341; *Clark v. Tennant*, 5 Neb., 549; *Western Ins. Co. v. Putnam*, 20 Neb., 331; Addison, Contracts [Morgan's ed.], secs. 359-363; *Swain v. Semens*, 9 Wall. [U. S.], 272; Benjamin, Sales [4th Am. ed.], 216; *Schultz v. Bradley*, 57 N. Y., 646.)

Sedgwick & Power, *contra*.

HARRISON, J.

The plaintiff declared, in the petition filed in the district court of York county, upon two orders for nursery stock, including quite a number of apple and other fruit trees, alleging sale and delivery, and also that the prices charged were the reasonable prices and values of the trees, etc. The amount claimed was \$105 and interest. The defendant answered and admitted signing the orders for the nursery stock, and except such admission denied each and every allegation contained in the petition, and further stated as follows: "And for further answer herein defendant alleges that prior to and at the time of the signing of the aforesaid orders, the plaintiff represented and stated to the de-

Bryant v. Thesing.

defendant that the plaintiff dealt in budded nursery stock only, and that the plaintiff had and sold no other fruit trees, bushes, vines, etc., except budded stock, and agreed and represented that the stock that should be delivered to defendant under the said orders should be budded stock as aforesaid, and the defendant relied upon the said representations and so signed the aforesaid orders, which otherwise he would not have done. And defendant says that the said representations were wholly false and fraudulent, as the said plaintiff was not then dealing in budded stock, but was dealing in inferior kinds of grafted and common stock, and the stock which the plaintiff was to deliver to the defendant, as hereinafter set forth, was not budded stock and was of no value to the defendant whatever." That he was not notified of the arrival of the trees, etc., at York, and they were allowed to remain there in such a situation and condition that they were so injured as to be entirely worthless; and for further answer alleged that subsequent to the signing of the orders, and before the time of delivery of the stock was attempted, the plaintiff released and discharged defendant from any obligation to receive the nursery stock and it was agreed the orders should be canceled and annulled. The plaintiff in reply denied each and every allegation of new matter contained in the answer and alleged due and timely notice to defendant of the arrival of the nursery stock at York. A trial to the court and a jury resulted in a verdict and judgment in favor of defendant.

It is claimed by counsel for plaintiff that the orders were in writing and could not be released or discharged by a subsequent parol agreement, and that if they could, conceding it to have been proven, no consideration was shown for an agreement withdrawing the orders, other than the mutual waiver of the rights of the parties which had arisen by virtue of the execution and delivery of the orders. The testimony was of a nature to justify a conclusion that at

some date subsequent to making the orders, and prior to the time for delivery of the articles ordered, it was agreed by and between the agent for the plaintiff who took the orders and had charge of the delivery of the nursery stock for plaintiff, including these orders and others forwarded at the same time and to the place, that these orders were canceled and discharged. This was sufficient to release the parties from their obligations. (Clark, Contracts, pp. 609, 620; *McCreery v. Day*, 6 L. R. A. [N. Y.], 503; *Dignan v. Spurr*, 28 Pac. Rep. [Wash.], 529.)

It is contended by counsel for plaintiff that under the general rule that parol evidence will not be received to contradict, vary, or modify the terms of a written agreement, no parol testimony should have been allowed on the branch of the case in relation to representations alleged to have been made by the agent who effected the sale, respecting the nursery stock, that it was to be "budded stock." The orders in question were signed by defendant, but not by plaintiff, and each of them was but a memorandum, or succinct statement, of some of the most important items of the contract, and we have no doubt that the representation or promise that the nursery stock to be delivered would be "budded," was material to the subject-matter of the contract embodied in the orders, and that it was competent as a defense, and parol testimony was competent to show that the representation was made, that the defendant was induced thereby to sign the orders, and that the representation or promise was untrue, or not performed. (*Barnett v. Pratt*, 37 Neb., 349; *Peck v. Jenison*, 58 N. W. Rep. [Mich.], 312; *Cullmans v. Lindsay*, 6 Atl. Rep. [Pa.], 332.)

It is further urged in this connection that the evidence discloses that the defendant did not refuse to take the nursery stock because the trees were not "budded," but assigned as a reason for his refusal to receive it his discharge from any obligations assumed by the orders by subsequent

Bryant v. Thesing.

oral agreement; that the defense under consideration was incompetent and should have been rejected. The testimony clearly proved that the promise in regard to the quality of the stock was made, and that a considerable portion of what was attempted to be delivered did not fulfill the promise. Neither of the orders was for any specific tree or vine named in it, nor were prices stated for each or any particular one, but on each order the money consideration was given in a lump sum or total amount. In other words, the orders were not, as shown by their terms and conditions, severable. The plaintiff had pleaded the orders, which were admitted by defendant, and also alleged and proved an attempted delivery of what he claimed satisfied the demands of the orders. It was entirely proper then to prove that the stock tendered was not in whole or in part as ordered. One sum was stated in each contract as the price. The nursery stock designated in each order was an entire lot, and all the trees to be of the same quality. The plaintiff claimed to have fulfilled the terms of the orders in respect to delivering the trees and of the kind and quality, and it was certainly competent for the defendant to prove the contrary, or to show that plaintiff had not done so. Where the order for goods is for an entire lot and the price stated in a lump sum, the order or contract is not severable, and if of the goods tendered for delivery a considerable number differ in quality from those ordered, the buyer is not required to receive the goods or any part of them, but may reject the whole. (*Sidney School Furniture Co. v. School District of Warsaw Township*, 27 Atl. Rep. [Pa.], 856.)

It is urged that the court erred in an instruction to the jury whereby it was stated that it devolved upon the plaintiff to prove every material allegation of his petition, and unless he had done so, or if the evidence as to such allegations was evenly balanced, the verdict should be in favor of defendant; that, inasmuch as the defendant, in his an-

swer, admitted the execution of the orders, there was no portion of the issues, the burden of proving which was on the plaintiff; that the trees, etc., were delivered, was alleged in the petition and denied in the answer, and it was the duty of the plaintiff to prove it. The issues in the case and their conditions as presented by the pleadings had been fully stated and outlined to the jury in instructions given prior to the one in question, and, in view of the relative rights of the parties as developed and established by the evidence introduced, we are unable to discover wherein the plaintiff was or could have been prejudiced by this instruction. Furthermore, as to the affirmative allegations and defenses of the answer, the jury were instructed that the defendant must furnish proof of them.

Error was properly assigned in regard to instructions on the branch of the case in relation to the alleged discharge or release of the orders by parol. Agreeably to our views on this portion of the action, the instructions were proper and correct.

The court instructed the jury that if it was shown by the evidence that the plaintiff's agent represented or promised that the nursery stock ordered would be of a particular kind or quality, and the defendant was thereby induced to sign the orders and the stock tendered or offered to be delivered or any considerable or material portion of it was not of the kind or quality promised, the defendant was under no obligation to accept, but could refuse it. It is alleged that these instructions were erroneous, in assignments properly made. The instructions on these points in the case contained a correct statement of the rule, but were not entirely applicable to the facts in this case. It appears from the evidence that the defendant did not refuse to receive the stock because not of the kind ordered, but, when the jury had determined from the evidence that the trees, etc., were not of the kind ordered, as they must have done before they could conclude, as they were informed, that

Dobson v. State.

defendant had a right to refuse the stock, the defendant would be entitled to a finding in his favor for the failure of the plaintiff to deliver or tender that which was ordered, hence the rights of plaintiff could in nowise be prejudiced by these instructions. The judgment of the district court is

AFFIRMED.

ALEXANDER DOBSON V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1895. No. 6855.

Larceny: POSSESSION OF STOLEN GOODS: EVIDENCE. The effect to be given to the fact of possession recently after the larceny of personal property is a question of fact solely for the jury to determine when considered in connection with all the other facts and circumstances proved on the trial. Following *Robb v. State*, 35 Neb., 285.

ERROR to the district court for Cherry county. Tried below before KINKAID, J.

The case is stated by the commissioner.

W. H. Westover and Reese, Gilkinson, Comstock & Reese, for plaintiff in error:

The court below erred in giving the following instruction: "The jury are instructed by the court possession of stolen property, recently after the same has been stolen, unexplained by the circumstances attendant thereon or otherwise, constitutes *prima facie* evidence of the guilt of the party so found in the possession thereof." (*Robb v. State*, 35 Neb., 285; *Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Neb., 102; *Grentzinger v. State*, 31 Neb., 460; *Pollard v. State*, 26 S. W. Rep. [Tex.], 70; *Tomerlin v.*

State, 26 S. W. Rep. [Tex.], 214; *State v. Walters*, 34 Pac. Rep. [Wash.], 938; *Harper v. State*, 13 So. Rep. [Miss.], 882.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state.

RYAN, C.

The defendant was convicted of larceny in the district court of Cherry county and was sentenced to imprisonment for a term of three years in the penitentiary, etc. The property stolen consisted of two steers claimed to have been taken from the open prairie and shipped to South Omaha, and there sold by an agent of the plaintiff in error, under the direction of the party last indicated. On its own motion the court have the following instruction, to which the plaintiff in error duly excepted:

"4. The jury are instructed by the court possession of the stolen property, recently after the same had been stolen, unexplained by the circumstances attendant thereon or otherwise, constitutes *prima facie* evidence of the guilt of the party so found in the possession thereof."

In *Robb v. State*, 35 Neb., 285, it was said: "The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial. [Citing] *Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Neb., 102; *Grentzinger v. State*, 31 Neb., 460; 2 *Thompson*, Trials, sec. 1894." It is perhaps true that in the case just cited there was not a direct disapproval of the use of the words "*prima facie*" in the connection in which they occur in the above copied instruction, and yet, impliedly, there was such disapproval in the language quoted. If the effect to be given the fact of possession was solely for the jury, it was improper for the court to instruct that such evidence should be deemed *prima facie* sufficient for

Steen v. Scheel.

any purpose. Whether it was *prima facie* or conclusive was solely for the jury to determine, unaided by any suggestions of the court upon that proposition of fact. For the error pointed out the judgment of the district court is

REVERSED.

JOHN STEEN V. FRANK R. SCHEEL.

FILED NOVEMBER 6, 1895. No. 5259.

1. **Landlord and Tenant: CONSTRUCTION OF LEASE.** A lease provided that the tenant should have and hold the leased premises "from the 1st day of December, 1887, to the 1st day of December, 1889, with the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891. * * * If the tenant holds over the term of two years as above agreed, this lease shall be binding upon both parties for the next two years or until the 1st of December, 1891." *Held*, That this was a lease of the premises for two years from December 1, 1887, and an agreement on the part of the lessor that at the expiration of the term he would re-lease the premises to the tenant, in case he should desire it, on the same terms and conditions mentioned in the first lease
2. —: —. The tenant at no time had any communication with the lessor on the subject of renewing the lease. Before his term expired he removed his furniture and goods out of the leased building and locked it up. He occupied no part of the premises after the termination of the lease and exercised no control over them further than the retention of the key for about two months when he sent it to the lessor. *Held*, That these facts were insufficient to raise the presumption or support a finding that the relation of landlord and tenant existed between the parties after the 1st day of December, 1889.
3. —: **CONTRACT.** Generally, the relation of landlord and tenant is founded upon express contract; but such relation may be presumed from the conduct of the parties in the premises.

ERROR from the district court of Saunders county. Tried below before MARSHALL, J.

J. R. Gilkeson, for plaintiff in error, cited: *Hammond v. Eckhardt*, 9 N. Y. Sup., 508.

George I. Wright, also for plaintiff in error.

George W. Simpson and *J. E. Frick*, *contra*, cited: *Hunter v. Silvers*, 15 Ill., 174; *Sutherland v. Goodnow*, 108 Ill., 528; *Thiebaud v. First Nat. Bank*, 42 Ind., 212; *Bradford v. Patten*, 108 Mass., 153; *Barnett v. Feary*, 101 Ind., 95; *Eichorn v. Peterson*, 16 Ill. App., 601; *Reed v. Campbell*, 4 Atl. Rep. [N. J.], 433; *Elevator Co. v. Brown*, 36 O. St., 660; *Blumenberg v. Myres*, 91 Am. Dec. [Cal.], 560; *Crommelin v. Thiess*, 70 Am. Dec. [Ala.], 499; *Schuyler v. Smith*, 51 N. Y., 309.

RAGAN, C.

On the 25th day of October, 1887, John Steen and Frank R. Scheel entered into an agreement in writing, in and by which Steen leased to Scheel a building known as the "Killian Building," situate on block 149, in the city of Wahoo. The lease provided that Scheel was to have and hold the leased property "from the 1st day of December, 1887, to the 1st day of December, 1889, with the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891." The rent reserved in such lease was \$960, payable in installments of \$40 on the first day of each month, commencing on the 1st day of December, 1887. The lease further provided: "But it is further agreed that if party of the second part [tenant] holds over the term of two years as above agreed, that this lease shall be binding upon both parties for the next two years, or until the 1st of December, 1891." Scheel entered into the possession of the leased premises and paid the rent thereof up to the 1st day of November, 1889. Prior to the 1st day of December, 1889, he moved his furniture and stock of goods out of

the building into a building of his own which he had constructed during the summer of 1889. He locked up the leased building, but retained the key thereof until some time in January, 1890, when he left it at the house of Steen. Steen did not at any time notify Scheel that he could or could not renew the original lease or remain in possession of the leased property thereunder after the 1st day of December, 1889. Scheel did not renew or attempt to renew the original lease, had no communication with Steen on the subject, nor did he occupy the property or any part thereof after the said date further than to retain possession of the key. Steen brought this suit against Scheel to the district court of Saunders county to recover \$120 rent for said premises for the months of November and December, 1889, and January, 1890. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of Steen for the sum of \$40, the rent for such building for the month of November, 1889, and to reverse the judgment pronounced on this verdict Steen prosecutes to this court a petition in error.

1. What construction should be placed upon these clauses found in the lease: "With the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891;" "But it is further agreed that if the party of the second part holds over the term of two years, as above agreed, that this lease shall be binding upon both parties for the next two years or until December 1, 1891"? Was this a lease of the property to commence on the 1st day of December, 1889, and to terminate on the 1st day of December, 1891? In *Sutherland v. Goodnow*, 108 Ill., 528, the lease contained this clause: "And it is also provided, as a part of this agreement, that the said Sutherland shall have the option to take the said premises for another year at the same price or rent, provided said first party does not sell said premises before the end of the month of April, A. D. 1881." The court, in

construing this provision of the lease, held: "A clause in a lease for one year giving the lessee the option, on a certain condition, to renew the lease for another year, is not a demise to take effect at the expiration of the first year. It is a mere covenant or undertaking of the lessor to let the lessee have a second term, which may be enforced on bill for specific performance or upon which an action at law may lie for a breach." (See, also, *Hunter v. Silvers*, 15 Ill., 174.) We think a proper construction of this lease is that by it Steen leased the premises to Scheel absolutely for two years and agreed that at the expiration of the original lease he would make another lease of the premises to Scheel in case he should desire it, on the same terms and conditions mentioned in the first lease. By the lease between the parties Steen did not lease the premises to Scheel for two years from the 1st day of December, 1889, but agreed in writing that he would lease the premises if Scheel should desire said lease.

2. Counsel for Steen does not seem to question this construction of the lease, but his contention is that at the expiration of the lease Scheel did not surrender possession of the leased premises to Steen; that after December 1, 1889, Scheel remained in possession of the premises and thereby exercised his option to re-lease the premises under the terms of the original lease for two years from December 1, 1889; and that by his failure to deliver the actual possession of the premises to Steen and his remaining in possession thereof after the original lease expired he became a tenant of the premises for two years from December 1, 1889. Generally, the relation of landlord and tenant is founded upon express contract; but the relation may be presumed from the conduct of the parties toward each other. Would the facts that Scheel, at the expiration of his original lease, neglected to surrender the actual possession of the leased premises to Steen, neglected to notify him that he did not desire to re-lease the premises or to

Steen v. Scheel.

occupy them after the expiration of his original lease, and his retention of the key to the building, support a finding that the relation of landlord and tenant existed between Steen and Scheel after the 1st day of December, 1889? We think not. In *Canal Elevator & Warehouse Co. v. Brown*, 36 O. St., 660, the elevator company leased certain property to Brown from the 1st day of May, 1871 to the 1st day of September, 1879. The lease contained a provision that in case the elevator company should, during the existence of the lease, purchase the fee-simple title to the premises that the lessee at the expiration of the lease would re-lease the property for eight years on the same terms as he held it under the original lease. Before the original lease expired the elevator company notified the lessee that it had purchased the fee-simple title to the leased premises and requested the lessee to renew the lease. The lessee declined to renew the lease, and on the 2d day of September, 1879, vacated the premises and two days thereafter returned the keys to the lessor. The lessee, however, left some four hundred bushels of coal in the leased property until September 18, 1879. It was insisted by the lessor that as the lessee had occupied the premises subsequent to September, 1879, he must be regarded as having renewed the lease, and in speaking of this contention the court said: "Whether temporary and partial occupancy of premises by lessees should be regarded as consent to and in effect a renewal, under such a clause in a lease, must be determined from the circumstances, and not merely from the fact of such occupancy. Looking to the terms of the notice to renew, given by the lessor on August 30, 1879, the refusal of the lessees to renew, their removal from the premises on September 2, 1879, and the return of the keys to the office of the lessor shortly thereafter, we are led to the conclusion that there was no act of the lessees which should estop them to deny such renewal. The fact that a small quantity of coal was permitted to remain in one of the

bins until September 18, 1879, is explained in the testimony, and cannot properly lead to any other conclusion than the one already stated, for the intention not to renew had already been manifested in unmistakable form." (See to the same effect *Thiebaud v. First Nat. Bank of Vevay*, 42 Ind., 212; *Renoud v. Daskam*, 34 Conn., 512; *Bradford v. Patten*, 108 Mass., 153.) We are not called upon at this time to define what particular conduct will raise the presumption or support a finding that the relation of landlord and tenant exists between two or more parties; but the evidence in this record is insufficient to raise such presumption or support a finding that such relation existed between Steen and Scheel after the 1st day of December, 1889. If the conduct of the parties has been such as to bind Scheel for the payment of this rent to the 1st day of December, 1891, of course Steen is bound to recognize Scheel as his tenant for that time; in other words, the contract must be mutual to bind either. If this was an action of forcible detainer by Steen against Scheel for the possession of these premises, and if the provision in the lease should be treated as a continuing offer and agreement on the part of Steen to lease the premises for a further term of two years after the expiration of the original lease, still there would be an entire lack of evidence to show that Scheel accepted of said offer or agreed to lease such premises for said second term; and the fact that he locked up the building at the time that he removed his goods therefrom and retained the key without paying any rent for said premises after December 1, 1889, offering to pay any, or even requesting a lease of said premises after that time, or notifying Steen that he had elected to avail himself of the offer and agreement in the lease to occupy as tenant for two years after the first lease expired, would not defeat such action by Steen. The judgment of the district court must be and is

AFFIRMED.

THOMAS E. FARRELL ET AL., APPELLEES, v. M. REED
ET AL., APPELLANTS.

FILED NOVEMBER 6, 1895. No. 5383.

1. **Vendor and Vendee: TRUSTS: MORTGAGE FORECLOSURE: DEFICIENCY JUDGMENT AGAINST TRUSTEE.** A number of persons purchased land and caused the title to be taken in the name of one of the number, who gave his notes secured by mortgage on the land for the deferred purchase money. These notes were signed "A. B., Trustee," but neither the notes nor the mortgage disclosed the nature of the trust or the names of the *cestuis que trustent*. Held, That on foreclosure of the mortgage the holder was entitled to a deficiency judgment against the trustee but not against the *cestuis que trustent*.
2. **Negotiable Instruments: LIABILITY OF TRUSTEE.** A negotiable instrument signed by a person who adds thereto the word "trustee," or like term, without disclosing the trust, or the name of the *cestui que trust*, is the personal obligation of the signer and not of the *cestui que trust*. The word "trustee" is in such case merely *designatio personarum*.

APPEAL from the district court of Adams county. Heard below before GASLIN, J.

W. P. McCreary and John M. Ragan, for appellants.

Batty, Casto & Dungan, contra.

IRVINE, C.

This was an action of foreclosure wherein, after the mortgaged property had been sold, application was made for a deficiency judgment against the appellants. Such a judgment was rendered and the appellants contend it was erroneous. So far as the allegations of the petition affect the personal liability of appellants, they are to the effect that the appellants bought from Higinbotham and Dutton the mortgaged premises. A written contract was entered

into by appellants reciting that the land had been bought for the use and benefit of all the appellants, their several interests being stated in the contract, and that they had caused it to be conveyed to Reed in trust for himself and the other appellants; that the trustees should hold the land for the purpose of conveying the same upon sales to be made; that out of the proceeds of the sales the expenses should be paid, and thereafter the proceeds of such sales applied to the satisfaction of the mortgage on the property; that all the moneys in excess of what was requisite for that purpose should be divided among the appellants in proportion to their several interests in the land. That in pursuance of the said contract the land was conveyed to Reed as trustee for himself and the other appellants; that Reed, as trustee for himself and the other appellants, made and delivered to Higinbotham and Dutton two notes, set forth in the petition, each one signed "M. Reed, Trustee," without disclosing the nature of the trust or the names of the *cestuis que trustent*; that the mortgage was given to secure the payment of these notes; that the notes were transferred to the appellants. The decree on this question finds that the appellants are the owners of the property mortgaged, and that they caused Reed as trustee to make, execute, and deliver the notes and mortgage to secure the balance of the purchase price of the property. There is no further finding of fact affecting the right to the deficiency judgment. The court rendered a judgment against all the appellants for the full amount of the deficiency.

No extended consideration of the questions presented is necessary. It is well settled that where an agent or a trustee or an executor signs a negotiable instrument in his own name without disclosing on the face of the instrument the fact that he is acting as agent or in a fiduciary capacity, and also the name of his principal or *cestui que trust*, the agent, trustee, or executor is personally liable on the instrument and the principal, *cestui que trust* or estate, is not

Kennedy v. Merrick.

liable. Parol evidence is inadmissible to show a different liability. In such case the words "agent," "trustee," and "executor" are merely *descriptio personarum*. (*Brown v. Parker*, 7 Allen [Mass.], 337; *French v. Price*, 24 Pick. [Mass.], 13; *Bartlett v. Hawley*, 120 Mass., 92; *Hancock v. Fairfield*, 30 Me., 299; *Hall v. Bradbury*, 40 Conn., 32; *Pentz v. Stanton*, 10 Wend. [N. Y.], 271; *Conn v. Scruggs*, 5 Bax. [Tenn.], 567; *Graham v. Campbell*, 56 Ga., 258; *Village of Cahokia v. Rautenberg*, 88 Ill., 219; *Anderton v. Shoup*, 17 O. St., 126; *Ohio Nat. Bank v. Cook*, 38 O. St., 442.) Therefore the case falls precisely within the rule of *Reeves v. Wilcox*, 35 Neb., 779, followed by *Reynolds v. Dietz*, 39 Neb., 180. The petition did not state facts sufficient to establish a personal liability against any of the appellants except Reed. Reed was clearly liable. The judgment against Reed is affirmed and the personal judgment against the other appellants is reversed and the application for personal judgment against them denied.

JUDGMENT ACCORDINGLY.

WILLIAM J. M. KENNEDY, APPELLEE, v. H. J. MERRICK,
EXECUTOR, APPELLANT.

FILED NOVEMBER 7, 1895. No. 6218.

Executors and Administrators: CONSTRUCTION OF WILL.

The court will not construe the clause of a will devising certain real estate, in a suit brought for that purpose by an heir and devisee of the testatrix against the executor, as such, where it appears the latter has no interest whatever in the adjudication of the matter by the court, and that a judicial interpretation of the will could be of no aid or assistance to the executor in administering the estate.

APPEAL from the district court of Johnson county.
Heard below before BUSH, J.

S. P. Davidson, for appellant.

J. Hall Hitchcock and *T. Appelget*, *contra*.

NORVAL, C. J.

This suit was brought in the court below to obtain a judicial construction of a clause in the last will and testament of Harriet L. Kennedy, who died in Johnson county on or about the 21st day of June, 1891. The defendant, H. J. Merrick, was appointed executor of the will, which was duly probated, and as executor he is sued. The clause of the will which the court is asked to interpret reads as follows: "I give, devise, and bequeath to my beloved son, William J. M. Kennedy, and his children forever, as an annuity, the use and annual income of the following estate, to-wit: The southeast quarter of section fifteen (15), in township six (6), of range eight (8) east, in Gage county, state of Nebraska, together with the buildings and appurtenances thereof." The plaintiff is William J. M. Kennedy, the sole heir and one of the devisees and legatees of the testatrix, his deceased mother.

The contention of the plaintiff was, and is, that, under the will, he took a fee-simple title to the land above described, while the defendant insists that the clause above quoted, when taken in connection with the other provisions of the will, should be construed as granting and bequeathing unto the plaintiff and his children the use and annual income of the premises therein mentioned, and not as devising unto him or them the title in fee-simple to said tract. Upon the hearing, the district court entered its finding and decree as follows:

"Now, on this 9th day of December, 1892, this cause came on further to be heard, and the court, having been fully advised in the premises on a former day of this term, does find that Harriet L. Kennedy, deceased, on September

Kennedy v. Merrick.

17, 1889, made her last will and testament, and that it was the intention of said testator to give her son, William J. M. Kennedy, and his children forever, as shown by said will, the use and annual income of the property mentioned in the petition, to-wit, the southeast quarter of section fifteen (15), township six (6), range eight (8), in Gage county, Nebraska.

"The court further finds that the intention of said testator as to the use and annual income of the property mentioned in said will is inconsistent with the established rules of law, and therefore void, and the court further finds that under said will that the legatees, William J. M. Kennedy and his children, are possessed in fee-simple of said described real estate.

"It is therefore adjudged and decreed that said William J. M. Kennedy and his children, under said will, take the real estate described, to-wit, the southeast quarter ($\frac{1}{4}$) of section fifteen (15), township six (6), range eight (8), in Gage county, Nebraska, not as an annuity only, but absolute, and that plaintiff pay the costs of this proceeding, to which defendant excepts and prays an appeal, and is allowed forty days to present bill of exceptions."

From this decree the executor has prosecuted an appeal.

There is considerable discussion in the briefs of counsel for the respective parties upon the propositions whether the plaintiff has the right to bring the action and whether the construction placed upon the will by the trial court is sound or not. In the view we take of the case it does not become material to determine either of these questions, and we shall not do so. We are prompted to this course by the fact that some of the parties interested in the estate, and who are made devisees by the will, namely, the children of the plaintiff, are not before the court.

It appears from the averments of the petition that the time for filing claims against the estate has expired, and that the executor has in his hands, derived from the dispo-

sition of personal property of the deceased, and from the sale of her real estate, other than above described, moneys abundantly sufficient to pay all legal claims and debts against the estate, together with the costs of administration. The record likewise discloses that the defendant is neither an heir, legatee, nor devisee of the testatrix, and that all the rents received by the executor from the premises in dispute have been paid over to the plaintiff. By the will, the executor is not made a trustee, and the will contains no provision making it his duty to hold, control, or manage the real estate or any legacy bestowed for the benefit of the devisees or legatees named therein. He has possession of the real estate, but this he is entitled to alone during the settlement of the estate. It is obvious, under the facts as they appear of record, that the plaintiff has made no case, as against the executor, for obtaining the adjudication of the court as to the meaning and legal effect of the will. As was well said by Welch, C. J., in his opinion in *Corry v. Fleming*, 29 O. St., 149: "It is only in cases where a trust is involved, or where the duty of an executor, administrator, or other trustee is of uncertain nature, requiring the guidance or direction of the court, that the court can be called upon merely to give its opinions to the true construction of a will." It is plain that the executor is in no manner interested in ascertaining whether the plaintiff alone, or he and his children together, took the lands mentioned in the decree in fee-simple, or a life estate merely. The opinion of the court as to the effect of the will upon these lands would be of no assistance to the executor in the further discharge of his duties, nor will the failure to construe the will in the slightest degree embarrass him in administering the estate. Moreover, a mere opinion of the court herein upon the construction of the will, if obtained, could be of no value to the plaintiff, inasmuch as none of the parties interested, except himself, are before the court. Counsel for appellee must have taken the same view when

Merrick v. Kennedy.

they filed in this court their motion to dismiss upon the ground "that the appellant had no interest in the result of the suit as brought in the district court, and therefore not entitled to an appeal." If appellant has no such interest as would authorize him to have the decision of the lower court reviewed, it requires no argument to establish that the action was improperly brought against him in the first instance. The decision of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

H. J. MERRICK v. WILLIAM J. M. KENNEDY.

FILED NOVEMBER 7, 1895. No. 6367.

1. **Statutes: CONSTRUCTION.** Special provisions of a statute in regard to a particular subject control general provisions.
2. **Administration of Estates: DISTRIBUTION: APPEAL.** Under section 304, chapter 23, Compiled Statutes, the right to appeal from a final order of distribution made by a county court in the settlement of an estate of a deceased person is limited to "any person aggrieved." In order to enable a party to appeal in such case he must have been injuriously affected by the order or decree.
3. **Executors and Administrators: DISTRIBUTION: APPEAL.** The executor of an estate, as such, cannot prosecute an appeal from a final order of distribution made by the county court, where he is not pecuniarily affected by such order.
4. **County Courts: SETTLEMENT OF ESTATES: REVIEW.** A county court has power to so far open up the settlement of a former account of an executor as to correct any error or mistake therein, except as to items in dispute which have been previously heard and determined by the court.
5. ———: ———: ———. An executor may appeal from an adverse decision of the county court upon his petition to correct an error or mistake in the settlement of his former account.

Merrick v. Kennedy.

6. ———: ———: WILLS. The county court may order the distribution of the personal estate remaining in the hands of an executor after the payment of all debts and charges of administration, though an action brought against him by an heir and devisee is pending in the district court for a construction of a clause in the will relating alone to the disposition of certain real estate, where it appears that the opinion and decision of the court as to the meaning and legal effect of said provision, when obtained, would not assist the executor in the discharge of the duties of his trust.

ERROR from the district court of Johnson county. Tried below before BUSH, J.

S. P. Davidson, for plaintiff in error.

T. Appelget and J. Hall Hitchcock, contra.

NORVAL, C. J.

Plaintiff in error, H. J. Merrick, was appointed executor of the last will and testament of Harriet L. Kennedy, deceased, by the county court of Johnson county, and duly qualified as such executor, and took upon himself the execution of the duties of his trust. Subsequently, and on the 28th day of June, 1892, a citation was issued by the county court commanding said H. J. Merrick to render an account of his doings as such executor, or show cause by a date named why he has failed so to do. On June 30, 1892, pursuant to said citation, plaintiff in error appeared before the county court and submitted, under oath, an itemized report of his receipts and disbursements as executor, the summary being as follows:

"Total amount received.....	\$4,764 70
Total amount paid out.....	3,453 61
Balance due.....	\$1,311 09"

On the same day the report was filed an order was made by the county court approving in all respects the said report of said executor as his final account; and on the same

Merrick v. Kennedy.

day the following order of distribution was entered by the county court, viz.:

"Now, on this 30th day of June, 1894, this cause came on for hearing upon the final report of H. J. Merrick, executor, and the evidence was submitted to the court. On consideration whereof the court finds that all debts, claims, and demands against said estate have been fully paid and satisfied, and that there remains as a residue in the hands of said executor the sum of \$1,311.09, and that William J. M. Kennedy is the only person entitled to said residue. It is therefore considered that said residue and all the property belonging to said estate, reserving the sum of \$25, to pay the claim of \$3.85 of N. Muggy, who cannot be found by the executor, and to pay the cost of these proceedings, taxed at \$21.15, be paid and allowed to said William J. M. Kennedy. GEORGE B. FOSTER,

"County Judge."

Afterwards, on the 18th day of July, plaintiff in error filed a supplementary and additional report, showing that he had paid out since the last report the sum of \$6.25 as expenses, and that by mistake he had stated in his report of June 30, 1892, that he had received \$2,596.80 from the sale of the Lancaster farm, when, in fact, he had only received in cash \$1,596.80 and a mortgage from the purchaser for \$1,000, due on or before February 5, 1894, bearing seven per cent interest, and that there remained in the hands of plaintiff in error, as executor, the sum of \$311.09, less the said sum of \$6.25. The supplemental report further sets forth that a suit is pending against him in the district court of Johnson county, brought by William J. M. Kennedy, seeking a construction of the last will and testament of Harriet L. Kennedy, deceased, as to whether by said will she devised to said William J. M. Kennedy certain real estate belonging to said estate and now remaining unsold, absolutely in fee-simple, or only the life estate therein; that the expenses and attorneys' fees incident to

contesting said suit will, in all probability, exceed the amount of money in the executor's hands. He asks that the original report be corrected as above indicated, that the order of distribution be vacated, and that no order of distribution be entered until the termination of the suit pending in the district court. On July 21, 1892, the county court refused to correct the original report or to disturb the order of distribution theretofore made on said June 30. From which refusals, as well as from said order of distribution, the executor appealed to the district court, where, subsequently, on motion of said William J. M. Kennedy, the appeal was dismissed.

The first question to which we shall give attention is whether the executor was entitled to appeal from the order of distribution. By section 42, chapter 20, Compiled Statutes, it is provided: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made or who may be affected thereby." The foregoing section restricts the taking of appeals to two classes of persons, viz., those against whom a final order, judgment, or decree is entered, and also to persons affected thereby. It is probable if the section applies to orders and decisions of the county court of the character under consideration, and the language employed by the legislature is to be taken in its literal sense, it would sustain the taking of the appeal in this case; but it is believed that the section quoted is not applicable here. On the contrary, that section 304 of chapter 23 of the Compiled Statutes governs and controls. That section declares: "Any person aggrieved by an order, decree, or denial of a court in pursuance of the provisions of this subdivision may appeal therefrom as provided for in other cases." The foregoing provision is found in the subdivision of said chapter 23, entitled "Partition and Distribution of Estates." It is by

the sections comprising this subdivision of the chapter that authority is conferred upon county courts to assign or order the distribution of the residue of the estate of deceased persons in the hands of administrators and executors among the heirs, devisees, or legatees; and following the several sections relating to the assignment and distribution of estates we find section 304, already quoted, which is a special provision authorizing appeals from orders or decrees partitioning and distributing estates, by any person aggrieved by such order or decree, and no right to appeal in such matters is given to anybody else. That being a special provision on the subject, it must be held applicable, rather than said section 42. (*McCann v. McLennan*, 2 Neb., 286; *People v. Gosper*, 3 Neb., 310; *Albertson v. State*, 9 Neb., 429; *Richardson County v. Milcs*, 14 Neb., 311; *Richards v. Clay County*, 40 Neb., 51.)

The next question which arises, is the executor herein, H. J. Merrick, within the meaning of said section 304, a party aggrieved, and thus had the right to appeal from the order of distribution made by the county court? The determination of this must depend upon whether the executor was in any manner injuriously affected by the order or decision from which an appeal was attempted. It appears from the final report of the executor, upon which the order distributing the estate was based, that the balance remaining in his hands, after the payment of the debts and expenses of administration, was \$1,311.09. It was the above amount, the residue of the estate reported by the executor to be in his hands, less \$25 reserved to pay the claim of one Muggy, for \$3.85, whose whereabouts is unknown, and certain costs which were ordered paid to William J. M. Kennedy, the sole person entitled thereto. Had the executor obeyed the order and paid the money, most certainly he would have been protected by the direction of the county court, even though the money had been ordered paid to a person who by law was not entitled to the same, which is

not claimed to be the case here. This being true, the executor could not have been aggrieved or injuriously affected by the order in question, and, hence, has no such standing in the case as to authorize him to prosecute an appeal. If by an order of distribution an administrator or executor should be directed to pay out more money than he has belonging to the estate, such administrator or executor would be injured thereby, since sections 313 and 314 of said chapter 23 authorize the bringing of a suit on the bond of an executor or administrator by any heir, legatee, or other person to recover his share of the estate after an order of distribution declaring the amount due him, if the same is not paid when demanded. Leaving out of view for the present the supplemental report of the executor, we are convinced that the executor was not entitled to appeal from the order of distribution. The following authorities sustain this conclusion: *Kellett v. Rathbun*, 4 Paige Ch. [N. Y.], 102; *Hyatt v. Dusenbury*, 106 N. Y., 663; *Bryant v. Thompson*, 128 N. Y., 426; *Bates v. Ryberg*, 40 Cal., 463; *Estate of Wright*, 49 Cal., 550; *Still's Estate*, 15 O. St., 484.

It appears from the supplemental report filed by the executor that in rendering his final account of the estate he erroneously charged himself therein with having received \$2,596.80 from the sale of a certain farm, whereas but \$1,596.80 was paid in cash by the purchaser, and a mortgage was given for \$1,000, which remains unpaid, and further, that the executor had necessarily expended since his final report \$6.25 in discharging the duties of his trust. He asked to have his account corrected accordingly, which the county court declined to do, although the following paper has been filed in the case:

"IN THE MATTER OF THE SETTLE-
MENT OF THE ESTATE OF HAR-
RIET L. KENNEDY, DECEASED. }

"Now comes William J. M. Kennedy, one of the heirs

Merrick v. Kennedy.

and residuary legatees of said estate, and hereby consents and agrees that H. J. Merrick, executor of said estate, shall retain from the funds now in his hands belonging to said estate the sum of \$6.25, being the sum claimed by him in his supplemental report filed July 18, 1892, and said William J. M. Kennedy hereby agrees to accept and receipt for the note mentioned in said supplemental report for \$1,000, as if he had received said amount in cash from said executor.

“Dated this 19th day of July, 1892.

“WILLIAM J. M. KENNEDY,

“By T. APPELGET &

“J. HALL HITCHCOCK,

“*His Attorneys Herein.*”

Practically this was an admission of the error claimed to have been made in the original report and account, and that the executor was entitled to an additional credit of \$6.25 for moneys disbursed since June 30, 1892. It is not contended, nor could it be successfully maintained, that the court could not open up the settlement of a former account of an executor to correct errors and mistakes therein. We think the county court has such power, where the matter has not already been previously litigated. It is not suggested that there has ever been a previous hearing and determination of the county court upon the matter of the mistake in the executor's account or of his being entitled to a credit for the \$6.25, but it is insisted that the filing of the above agreement of William J. M. Kennedy obviated the necessity of the court opening up the settlement of the executor's account of date of June 30. To this proposition we cannot agree. If a mistake had been made it should have been adjudicated by the county court and the order of distribution modified accordingly. As the order now stands, conceding that only \$1,596.80 was received in money on the sale of the farm, the executor is required to pay to the distributee over \$1,000 more money than re-

mains in his hands belonging to the estate. As we have seen, suit may be brought on the executor's bond by Kennedy to recover the full amount found by the county court to be due him. The executor was, within the meaning of the statute, "aggrieved" or pecuniarily affected by the order of July 21, and therefore he has the right to appeal therefrom.

Plaintiff in error insists the order of distribution should have been vacated because the supplemental report disclosed that a suit was pending against him in the district court seeking the construction of the will. It fully appears, and we have so held in the case of *Kennedy v. Merrick*, 46 Neb., 260, that the executor is not interested in procuring the opinion and decision of the court as to the meaning, and the legal effect, of the will in this case, and that a proper construction thereof would be of no assistance to the executor in the settlement of the estate. That provision of the will upon which a construction is desired relates to a bequest of real estate, and the opinion of the court thereon, if obtained, could not in the least affect the distribution of the personalty of the testatrix in his hands, in accordance with other provisions of the will. Distribution should not be delayed on account of the pending of the suit above mentioned. (*In re Scheidler's Estate*, 27 N. Y. Sup., 7.) For the reason stated, the judgment of the district court dismissing the appeal is reversed and the cause is remanded to that court for further proceedings in consonance with this opinion.

REVERSED AND REMANDED.

MAGGIE C. BLAKELY V. CHICAGO, KANSAS & NEBRASKA
RAILWAY COMPANY.

FILED NOVEMBER 7, 1895. No. 3607.

1. **Railroad Companies: RIGHT OF WAY: EASEMENTS.** A grant of a strip of land to a railroad company "for right of way and for operating its railway only" gave to the grantee a mere easement in such strip.
2. ———: **CONVEYANCE TO ANOTHER COMPANY OF RIGHT OF WAY: LIABILITY OF GRANTEE FOR DAMAGES.** The conveyance by a railroad company of a part of its right of way in which it had but an easement expressly limited to the operation of its own road, to a distinct and independent railroad company, which built and has ever since operated its line of railroad on the land conveyed to it, was an abandonment of such part by the railroad company first referred to, and, as against that last indicated, the original proprietor, through whom both companies claim their rights, is entitled to compensation with respect to the part occupied and used by the company last indicated.

REHEARING of case reported in 34 Neb., 284.

Alfred Hazlett and L. M. Pemberton, for defendant in error:

By permitting the defendant's grantor, the Chicago, Kansas & Nebraska Railway Company, to enter upon the land and fully construct and operate its road thereon without objection or protest, knowing all the time just what was being done, the plaintiff is estopped to maintain ejectment. (*Omaha & N. N. R. Co. v. Redick*, 16 Neb., 313; *Pryzbylowicz v. Missouri R. R. Co.*, 3 McCrary [U. S.], 586; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 O. St., 169; *McAulay v. Western V. R. Co.*, 33 Vt., 311; *Gray v. St. Louis & S. F. R. Co.*, 81 Mo., 126; *Dodd v. St. Louis & H. R. Co.*, 18 S. W. Rep. [Mo.], 1117; *Indiana B. & W. R. Co. v. Allen*, 113 Ind., 308; *Cairo & F. R. Co. v. Turner*, 31 Ark., 494; *Provolt v. Chicago, R. I. & P. R.*

Co., 57 Mo., 256; *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq., 316; *Curtis v. La Grande Hydraulic Water Co.*, 25 Pac. Rep. [Ore.], 378; *Martin v. Maine C. R. Co.*, 21 Atl. Rep. [Me.], 740; *Hentz v. Long Island R. Co.*, 13 Barb. [N. Y.], 646; *Lexington & O. R. Co. v. Ormsby*, 7 Dana [Ky.], 276; *Platt v. Pennsylvania Co.*, 43 O. St., 241.)

By the deed to the Republican Valley Railroad Company plaintiff conveyed her interest in the land, and has now no title or interest which she can assert against defendant. (*Yates v. Van De Bogert*, 56 N. Y., 527; *Nicoll v. New York & E. R. Co.*, 12 N. Y., 121; *Page v. Heineberg*, 40 Vt., 81; *Walsh v. Barton*, 24 O. St., 28; *Crolley v. Minneapolis & St. L. R. Co.*, 30 Minn., 541; *Chicago, B. & Q. R. Co. v. Lewis*, 53 Ia., 101; *Soukup v. Topka*, 55 N. W. Rep. [Minn.], 824; *Vail v. Long Island R. Co.*, 106 N. Y., 283; *Farnham v. Thompson*, 34 Minn., 330; *Horner v. Chicago, M. & St. P. R. Co.*, 38 Wis., 165; *Wier v. Simmons*, 55 Wis., 637; *Strong v. Doty*, 32 Wis., 381; *Williams v. Western U. R. Co.*, 50 Wis., 71; *Rawson v. School District*, 7 Allen [Mass.], 125; *Greene v. O'Connor*, 25 Atl. Rep. [R. I.], 692; *Higbee v. Rodeman*, 28 N. E. Rep. [Ind.], 442; *Heaston v. Commissioners of Randolph County*, 20 Ind., 398; *Schipper v. St. Palais*, 37 Ind., 505; *Sumner v. Darnell*, 27 N. E. Rep. [Ind.], 162; *Vermilya v. Chicago, M. & St. P. R. Co.*, 24 N. W. Rep. [Ia.], 234; *Junction R. Co. v. Ruggles*, 7 O. St., 1.)

Even if it should be held that the grant was made upon condition that the grantee should use and occupy the land for right of way purposes, the condition is being substantially complied with, for it is still being used for such purpose. (*Spaulding v. Hallenbeck*, 39 Barb. [N. Y.], 79; *Chapin v. School District*, 35 N. H., 445; *Inhabitants of Hadley v. Hadley Mfg. Co.*, 4 Gray [Mass.], 140.)

Griggs, Rinaker & Bibb, for plaintiff in error:

No estoppel was pleaded by the defendant. It is neces-

Blakely v. Chicago, K. & N. R. Co.

sary to plead an estoppel in order to take advantage of it. (*Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb., 746.)

In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged, and unknown to the party urging it. (*Nash v. Baker*, 40 Neb., 294.)

Plaintiff's deed did not convey an absolute title to the strip through her land. It merely conveyed a right of way or easement. (*Robinson v. Missisquoi R. Co.*, 59 Vt., 426; *Keeler v. Wood*, 30 Vt., 242; *Jones v. Van Bochove*, 61 N. W. Rep. [Mich.], 342; *Flaten v. City of Moorhead*, 53 N. W. Rep. [Minn.], 807; *Babcock v. Latterner*, 30 Minn., 417; *Ft. Worth & R. G. R. Co. v. Jennings*, 13 S. W. Rep. [Tex.], 270.)

RYAN, C.

An opinion was filed in this case which was reported in 34 Neb., 284. A rehearing was afterward granted, and upon reargument it is now reached for further consideration. The deed of Maggie C. Blakely to the Republican Valley Railroad Company conveyed a certain strip of land one hundred feet wide across certain lands described by government subdivisions, "to have and to hold the same unto the said railroad company, its successors and assigns." In connection with the language just quoted the controversy in the case hinges on the words following the names and description of the grantors and the acknowledgment of the receipt of \$900 consideration, which words are as follows: "do hereby grant, bargain, sell, and convey unto the Republican Valley Railroad Company, its successors and assigns, for right of way and for operating its railroad only," etc. The Chicago, Burlington & Quincy Railroad Company afterwards became the successor of the grantee above

named and, as such successor, assumed the right to, and, in so far as it had power, did convey to the defendant in error forty-two and a half feet in width of the above one hundred-foot strip. Plaintiff in error insists that by this conveyance there was an abandonment of that part of the right of way which the Chicago, Burlington & Quincy Railroad Company assumed to convey to the defendant in error, and that, therefore, plaintiff is entitled in this her action of ejectment to recover the same. The judgment of the district court of Gage county in denial of this right is presented for review.

The defendant in error contends that the words "for the right of way and operating its railroad only," following the granting clause, do not create a condition subsequent, and that, therefore, this action cannot be maintained. In *Chapin v. School District*, 35 N. H., 445, the term above used is thus discussed: "A subsequent condition is one which operates upon an estate already created and vested and renders it liable to be defeated. Thus, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited it shall be lawful for him and his heirs to re-enter and avoid the estate; in such case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. (Litt., sec. 325; 2 Black. Com., 154, 4 Kent's Com., 125.)" The deed of the plaintiffs in error contained no condition of the nature of that above indicated and illustrated, hence there was no condition subsequent.

Thus far we have agreed with the defendant in its contention that the deed of Maggie C. Blakely and husband contained no condition subsequent. It is assumed in argument that this much being established, the conclusion must of necessity follow that plaintiff could not insist that by the abandonment of a part of such right of way, such part would revert to Mrs. Blakely. The conveyance by

Blakely v. Chicago, K. & N. R. Co.

her in which her husband joined was of a certain strip of land one hundred feet wide to the Republican Valley Railroad company, "its successors and assigns, for right of way and for operating its railroad only." That the limitation, "for operating its railroad only," was confined to but one railroad requires no argument to establish. It is equally clear that this one road might be the grantee named, its successors or assigns, and it is not claimed that the defendant is a successor of the Republican Valley Railroad Company. If the right to operate a railroad upon the right of way strip conveyed by the Blakelys was, as we have seen, limited to one road, it would be impossible that defendant, under its deed, could deprive the Chicago, Burlington & Quincy Railroad Company of its right as a successor of the Republican Valley Railroad Company to operate its railroad upon the right of way granted by the Blakelys, for there was made by the Chicago, Burlington & Quincy Railroad Company no conveyance which purported to convey that portion of the right of way on which its railroad line was situated. If the defendant obtained a right to use a portion of the originally granted one hundred feet, by virtue of the deed from the Chicago, Burlington & Quincy Railroad Company of only a fraction thereof in severalty, the deed last named must be held not only to have conferred upon defendant full title to this fraction, but it must in addition be held to have destroyed the title and the right of use by the Chicago, Burlington & Quincy Railroad Company of the remaining fractional part which it never conveyed, for the Blakelys, by their deed, expressly limited the use to one company. A construction which would lead to such a result is absurd, and therefore we must construe the limitation of the sole use of the railroad in the deed of the Blakelys as not operative in favor of the defendant.

It has already been shown that the deed under consideration was one that contained no condition subsequent.

We shall now endeavor to ascertain and determine the exact nature of the title which, by virtue of the deed to it, was held by the Republican Valley Railroad Company, and which, therefore, that company was able to convey to the Chicago, Burlington & Quincy Railroad Company. In *Robinson v. Missisquoi R. Co.*, 59 Vt., 426, the clause, "for the use of a plank road," which immediately follows the description of the land conveyed, was held to limit the estate conveyed to a mere easement. In *Flaten v. City of Moorhead*, 53 N. W. Rep., 807, in a deed in the same connection as just indicated there was the clause: "Said tract of land hereby conveyed to be forever held and used as a public park." The supreme court of Minnesota, in which the above case was decided, held that the grantee did not upon the face of the instrument acquire an absolute title in fee. In *Lake Erie & W. R. Co. v. Ziebarth*, 33 N. E. Rep., 256, the appellate court of Indiana had under consideration a deed executed for a nominal consideration of a right of way one hundred feet wide. This deed provided: "The estate granted hereby is upon condition that the strip of land aforesaid shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purpose, the same shall revert to the grantor;" and it was held that the company did not take a fee in the strip, but a mere floating easement before the location of the grantee's line of railroad over the tract through which it was to be located. In *Reichenbach v. Washington S. L. R. Co.*, 38 Pac. Rep., 1126, the supreme court of Washington held that the conveyance of the right of way to be held "so long as the same should be used for the operation of a railroad," vested in the grantee a mere easement. The first paragraph of the syllabus of *Jones v. Van Bochove*, 61 N. W. Rep., 342, a case decided by the supreme court of Michigan, is in the following language: "A deed which, by its granting clause, conveys the right of way for a railroad, * * * and described as follows:

Blakely v. Chicago, K. & N. R. Co.

‘A strip of land forty feet wide * * * and being nine hundred and fifty-two feet in length,’ though in the usual form of a full warranty deed, conveys an easement therein only and not a fee.”

The cases above cited with reference to conveyances in terms limited proceed upon the principle that, as each grant was only of a right of user in a certain manner, such grant in effect was but an accordingly defined license. Between this class of cases and that relied upon by the defendant there is a marked difference, for in the latter the conveyance was in each instance of the fee. As was said in *Coburn v. Coxeter*, 51 N. H., 158: “A conveyance of a right of way over that parcel of land would clearly pass only an easement, leaving the fee in the grantor; but here the land itself, in the broadest terms, is granted, and the restriction upon the use is entirely consistent with the passing of the fee.” In the deed to the Republican Valley Railroad Company the grant of the strip of land was “for right of way and for operating its railroad only.” These words were words of limitation of the rights of the grantee with respect to the strip conveyed, to a mere easement. In *Henderson v. Hunter*, 59 Pa. St., 335, there was discussed the effect of a deed in which was contained a limitation, which was “for the erection of a house or place of worship for the use of the members of the Methodist Episcopal church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline,” etc. Agnew, J., delivering the opinion of the court, said: “The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or de-

terminate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of the condition to be annexed. 'A special limitation,' says Mr. Smith, in his work on Executory Interests, p. 12, 'is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry or claim, before it would, or might otherwise expire by force of, or according to, the general limitation.' A special limitation may be created by the words 'until,' 'so long,' 'if,' 'whilst,' and 'during,' as, when land is granted to one so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. (2 Black., Com., 155; Smith on Exec. Int., 12; Thomas Coke, vol. 2, 120-121; Fearne on Rem., 12-13, and note p. 10.) 'In such case,' says Blackstone, 'the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy.' The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor."

The case we have under consideration differs from that of *Henderson v. Hunter*, *supra*, in one respect, which should be noted, and that is, that the grant by the Blakelys was a mere easement, the legal title never having passed. There was therefore no question of the reversion of an estate involved. If the Republican Valley Railroad Company or its successor parted with the right to the use of forty-two and one-half feet in width of the hundred feet, there existed no right, title, or interest outstanding incompatible with the complete title in Mrs. Blakely and the right of possession

Blakely v. Chicago, K. & N. R. Co.

incidental thereto. In *Jones v. Van Bochove*, 61 N. W. Rep. [Mich.], 342, it was held that when the non-user of right of way of a railroad company was accompanied by acts which manifested an intention to abandon and which destroy the object for which the easement was created, or the means of its enjoyment, an abandonment will take place, and in support of this proposition a large number of cases were cited. In *Omaha S. R. Co. v. Beeson*, 36 Neb., 361, it was held that where a part of an ordinary highway had been vacated, the title thereto vested in the adjacent proprietors, and there exists no reason forbidding the application of this principle where the easement has been abandoned by a railroad company. It of necessity follows that the Republican Valley Railroad Company and its successor, the Chicago, Burlington & Quincy Railroad Company, must be held to have abandoned forty-two and one-half feet in width of their right of way so far as their own use of it was concerned. It is equally clear the defendant took nothing by the deed to it, for its grantor never had more than the right, itself, to use the one hundred feet strip for operating its railroad. In so far as the rights of the parties to this suit are involved, plaintiff was entitled to maintain its action against the defendant. It was stipulated in the district court that the Republican Valley Railroad Company, under its deed from plaintiffs, went into peaceable possession of the strip thereby conveyed and along its entire length built its line of road and continued its possession until the date of its sale to the Chicago, Burlington & Quincy Railroad Company; that said last named railroad company, since it became the owner of said strip, retained peaceable and uninterrupted possession of the same, except as was in said stipulation described as hereinafter indicated. It was further stipulated that before December 20, 1886, the Chicago, Kansas & Nebraska Railway Company transferred all its property, franchises, etc., to the defendant the Chicago, Kansas & Nebraska Railway

Company, which latter company thereupon, with the consent of the Chicago, Burlington & Quincy Railroad Company, took possession of the aforesaid strip, forty-two and one-half feet wide, and the line of road thereon constructed by the Chicago, Kansas & Nebraska Railway Company, and that said last named company and its successor has ever since remained in possession of said strip.

It is insisted by the defendant in argument that the plaintiff is now estopped to disturb defendant's possession of the forty-two and one-half foot strip and the line of road thereon constructed. There was presented no such claim by the pleadings, and it is clear by the proof above stated that there was no ground for estoppel shown. It may have been that there was acquiescence by silence or otherwise on the part of Mrs. Blakely in the construction of defendant's road as it was constructed, but this, if a fact, was neither pleaded nor proved. On the other hand it is perfectly consistent with the facts stipulated above, that plaintiff may have supposed that the line being built upon the forty-two and one-half foot strip was in the course of construction by the Republican Valley Railroad Company or by the Chicago, Burlington & Quincy Railroad Company. Under these circumstances we cannot say whether or not the estoppel in fact should be recognized. Certainly, in the present condition of the pleadings and evidence, this cannot be done. One thing is clear, however, and that is that over this strip forty-two and one-half feet in width there has been constructed and is now in operation a line of railroad in which the public at large is interested. As against the public, plaintiff must be deemed to have waived her right to insist that this strip shall be restored to her as though no railroad had been built or was in operation over it. As was said under somewhat similar circumstances in *Omaha & R. V. R. Co. v. Brown*, 14 Neb., 170: "But its [the railroad company's] first and highest duty was to keep open its line for the transportation of persons, prop-

Griffen v. State.

erty, and the public mails." We are aware that in *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371, and one case therein cited, there was used language which seems to ignore the rights of the public. In neither of these cases was there any reference to the language used in *Omaha & R. V. R. Co. v. Brown*, *supra*, and we therefore assume that both Judge MAXWELL and Judge REESE meant only to state a general rule and did not think it necessary to note the exceptions thereto. If in any way avoidable, there should be tolerated no resort to so radical a measure as the interruption of traffic over the line of the defendant by means of an ouster from the forty-two and one-half foot strip occupied by it. We have no doubt that upon this cause being remanded to the district court there will be no difficulty found in properly making up and trying the issues really involved, and that, if plaintiff is entitled to damages, ample means of redress will be found independently of an eviction of the defendant. The judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

ALFRED C. GRIFFEN V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. No. 6135.

1. **Criminal Law: FORGERY: UTTERING FORGED NOTES: INFORMATION: SENTENCE.** Where a verdict of guilty is responsive separately to each of two counts of an information, which counts together charge but one crime, such a verdict should, in entering judgment upon it, be treated as though both elements of the crime had been embraced in a single count.
2. ———: **ERROR IN ENTERING JUDGMENT: REVIEW: PRACTICE** Where there is found no error in the record, except an irregu-

Griffin v. State.

larity in entering judgment upon the verdict, a cause will be remanded to the district court with instructions to enter judgment on the verdict in the manner prescribed by law. Following *Dodge v. People*, 4 Neb., 220.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Will F. Gurley, for plaintiff in error, cited: *Haslip v. State*, 10 Neb., 590; 1 Daniel, *Negotiable Instruments* [4th ed.], secs. 664, 741, 743; *State v. Snow*, 30 La. Ann., 401; Wharton, *Criminal Law* [9th ed.], sec. 743; *People v. Galloway*, 17 Wend. [N. Y.], 541; *Roode v. State*, 5 Neb., 174; *Commonwealth v. Dallinger*, 118 Mass., 439; *Crawford v. State*, 19 S. W. Rep. [Tex.], 766; *State v. Lincoln*, 49 N. H., 471.

A. S. Churchill, Attorney General, for the state, cited: *Commonwealth v. Ross*, 2 Mass., 372; *Commonwealth v. Ward*, 2 Mass., 397; *Commonwealth v. Adams*, 7 Met. [Mass.], 50; *Perkins v. Commonwealth*, 7 Gratt. [Va.], 651; *Simmons v. State*, 7 O. St., 116; *Langdale v. People*, 100 Ill., 263; *Hess v. State*, 5 O., 5; *Griffin v. State*, 14 O. St., 55; *Commonwealth v. Taylor*, 5 Cush. [Mass.], 605; *State v. Carr*, 5 N. H., 367; *In re Walsh*, 37 Neb., 454; *State v. Eggesht*, 41 Ia., 574; *Devere v. State*, 5 O. C. C., 509; *Anderson v. State*, 26 Neb., 387; *Charles v. State*, 27 Neb., 881; *Nelson v. State*, 33 Neb., 528.

RYAN, C.

At the May term of the district court of Douglas county the plaintiff in error was found guilty upon each of two counts, one of which charged him with making and counterfeiting a certain described promissory note, the other with its utterance. A thorough examination of the evidence leaves no room for doubt that the plaintiff in error counterfeited and uttered the note as charged. It has been

Hamilton v. State.

held since the above conviction and sentence that the forgery and fraudulent uttering of a promissory note constitute but one crime, and in case of conviction that but one penalty can be inflicted. (*Vide In re Walsh*, 37 Neb., 454, filed June 30, 1893.) In the case under consideration the verdict of the jury responded separately, in the affirmative, to the charge contained in the first and likewise in the second count. In effect there was, therefore, but a finding of guilty on two elements, both of which, taken together, constituted but one crime. In this the accused was not prejudiced. Under the holding of this court in *Re Walsh, supra*, there could properly be but one sentence. In the case at bar there was a sentence imposed under the first count and there was a distinct sentence under the second count. This was irregular. As the only error found in the record was this irregularity, following *Dodge v. People*, 4 Neb., 220, the judgment of the district court is set aside and the cause remanded with directions to that court to render the proper judgment on the verdict heretofore returned.

JUDGMENT ACCORDINGLY.

DAVID HAMILTON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. No. 7369.

1. **Embezzlement: EVIDENCE: CONVERSION: PRINCIPAL AND AGENT.** That the relation of debtor and creditor exists between a principal and his agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzling or converting to his own use the property of his principal.
2. ———. The terms "shall embezzle" and "convert to his own use," found in section 121 of the Criminal Code, are synonymous;

Hamilton v. State.

but embezzlement is the fraudulent appropriation by an agent of the property of another.

3. ———: EVIDENCE: CONVERSION: INTENT. To sustain the conviction of an agent for embezzling or converting to his own use the property of his principal, the facts must warrant the conclusion that such conversion was made by the agent with a felonious intent.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

F. G. Hamer, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

RAGAN, C.

David Hamilton was convicted in the district court of Buffalo county of the crime of embezzlement and sentenced to the state penitentiary for one year. To reverse this sentence and judgment he prosecutes to this court a petition in error.

1. It appears from the record that in November, 1892, there was organized in said county a corporation known as the Farmers Elevator & Commission Company, hereinafter known as the "corporation." This corporation was organized for the purpose of buying and shipping grain and other commodities. It seems to have begun business December 1, 1892, and at that time it had to its credit in a bank in the city of Kearney something like \$1,400. The directors appointed Hamilton general manager at a salary of \$50 per month, but the duties of Hamilton as such manager are not disclosed by the record. The corporation embarked in the purchasing and shipping of grain and other commodities, Hamilton, it appears, doing the principal part of the buying, shipping, and selling. It appears also that the accounts of the corporation were kept by a book-keeper, but no part of these books is in the record. It seems that among the accounts on the books of the corporation was

the account of Hamilton with the corporation, though this account is not in the evidence. When Hamilton bought grain for the corporation he drew the corporation's check, on the bank in which it had its funds, signing the same with the corporate name by himself as general mauager. During the time Hamilton was conducting this business he sold the corporation grain to the amount of \$175. He sold it also an elevator or scale-house at a price of \$300, \$200 of which the corporation paid him by its stock; and it seems that he served the corporation three months, or at least it is admitted that it owes him three months' salary at \$50 a month. It also seems that Hamilton's account was or should have been credited with his salary, the value of the grain sold the corporation by him, and the balance of the \$100 due on the purchase of the elevator. There never was any settlement or accounting between Hamilton and the corporation; that is, it was never agreed between them which one owed the other and how much, nor was the amount that Hamilton was in debt to the corporation ever established by any judgment or decree.

Hamilton was charged in the information in this case with having embezzled \$500 of the funds of the corporation, and a jury found that he embezzled \$409.87. We do not think this conviction can be allowed to stand. It is evident from the record, although that is in a very unsatisfactory condition, that the jury reached the conclusion that Hamilton had embezzled \$409.87 of the money of the corporation after having reached another conclusion, viz., that that was the amount of money owing to the corporation by Hamilton on a settlement of the account between them. This will not do. The jury in this case was not charged with the duty of determining what was due from Hamilton to the corporation, but simply whether Hamilton, as charged in the information, had embezzled or converted to his own use \$500 of money belonging to the corporation. (*Van Elten v. State*, 24 Neb., 734.) An amicable settle-

ment or an adjudication of the account existing between Hamilton and the corporation may show that Hamilton is not indebted in any sum whatever to the corporation. To sustain the conviction of an agent for embezzling the property of his principal the record must clearly and unequivocally show that the property embezzled or converted to his use by the agent was the property of the principal. It is not enough to sustain such a conviction that the relation of debtor and creditor existed between them, and that on a balance being struck of the account that the agent would be found indebted to his principal. In this case Hamilton had charge of the funds of the corporation. He had a right to check them out for property purchased for the corporation, and for the expenses of conducting its business and paying its debts. Among these debts were the ones to himself for his salary, for grain sold the corporation, and for the elevator sold; and the mere fact that he overdrew his account did not of itself, without more, make him an embezzler. The terms "shall embezzle" and "convert to his own use," found in section 121 of the Criminal Code, are synonymous. For an agent to convert to his own use is made embezzlement by this statute, but embezzlement is the fraudulent appropriation by an agent or bailee of the property of another. (*Leonard v. State*, 7 Tex. App., 417.) To sustain this conviction the record must show that Hamilton was the agent of the corporation, that he had the possession or care of its moneys, and that he converted the same to his own use with a felonious intent. (*People v. Hurst*, 41 Mich., 328; *Beaty v. State*, 82 Ind., 228.) The evidence in this record does not disclose any fraudulent or felonious intent on the part of Hamilton in his dealings with the funds of this corporation, nor is the evidence sufficient to justify a jury in inferring such fraudulent or felonious intent. As already said, the jury based its verdict of embezzlement against Hamilton solely on the conclusion reached by them that Hamilton had overdrawn his

Conway v. Grimes.

account \$409.87. This fact alone, though supported by the evidence, will not, in view of all the other facts in evidence, including the course of dealings between the parties and their method of doing business, sustain this conviction.

REVERSED AND REMANDED.

JAMES CONWAY V. J. C. GRIMES.

FILED NOVEMBER 7, 1895. No. 5176.

1. **Bill of Exceptions: TIME TO PRESENT: LACHES: SETTLEMENT: MOTION TO QUASH.** A case was tried and a verdict rendered October 9, 1891. On the 14th of the same month a motion for a new trial was overruled, judgment rendered, and forty days given defendant to reduce his exceptions to writing and present them to plaintiff. November 18, following, the proposed bill of exceptions was presented to plaintiff, who, on the 24th of the same month, returned it without suggestion of amendment. September 21, 1892, the trial judge signed the bill of exceptions, certifying that it was then first presented to him. The record did not disclose any reason for the delay, nor did it show when the term of court, at which the judgment was rendered and a motion for a new trial was overruled, adjourned *sine die*. *Held*, (1) That by virtue of section 311 of the Code of Civil Procedure and the order of the court, that the plaintiff in error was required to present his proposed bill of exceptions to the trial judge for settlement within sixty days after the adjournment *sine die* of the term of court at which the motion for a new trial was overruled and judgment rendered (*Sherwin v. O'Connor*, 23 Neb., 221, followed); (2) that the presumption would not be indulged that such term of court was not finally adjourned prior to the 23d day of July, 1892; (3) that a motion to quash the bill of exceptions because not presented to the trial judge for settlement within the time required by law should be sustained.
2. ———. When a bill of exceptions has been quashed it cannot be examined for any purpose. *Jones v. Wolfe*, 42 Neb., 272, followed.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

A. M. Appelget and *T. Appelget*, for plaintiff in error.

L. C. Chapman, *contra*.

RAGAN, C.

J. C. Grimes brought this suit, an action in replevin, in the district court of Johnson county against James Conway. Grimes had a verdict and judgment, and Conway prosecutes to this court a proceeding in error.

The defendant in error has filed a motion to quash the bill of exceptions on the ground that the bill was not presented to and signed by the trial judge within the time required by the statute. The case was tried without a jury on the 9th day of October, 1891, and on the 14th of the same month Conway's motion for a new trial was overruled and judgment rendered in favor of Grimes. At the same time the court gave Conway forty days from the adjournment of that term of court *sine die* to reduce his exceptions to writing and present them to the opposite party. Conway reduced his exceptions to writing and presented them to Grimes' counsel on the 18th of November, 1891. On the 24th of said month counsel for Grimes returned the proposed bill of exceptions without suggestion of amendment. The record does not show when the term of court, at which the motion for a new trial was ruled upon and judgment rendered, adjourned *sine die*. The trial judge signed and allowed the bill of exceptions on the 24th day of September, 1892, and certifies that it was then presented to him for the first time. There is no showing in the record why the plaintiff in error delayed the presentation of this bill of exceptions to the trial judge for settlement for such a length of time.

Section 311, Code Civil Procedure, as it existed prior to

its amendment in 1895, provided: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose amendments thereto and shall return said bill with his proposed amendments to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case, upon five (5) days' notice to the adverse party, or his attorney of record, at which time the judge shall settle the bill of exceptions." By virtue of this section of the Code and the order of the court made in this case plaintiff in error was required to present his proposed bill of exceptions to the trial judge for settlement and allowance within sixty days after the adjournment *sine die* of the term of court at which his motion for a new trial was denied and judgment rendered against him. (*Sherwin v. O'Connor*, 23 Neb., 221.) As already stated, the record does not show when that term of the court adjourned without day. In order to sustain this bill of exceptions we would be required to presume that that term of court was not finally adjourned prior to the 23d day of July, 1892. We do not think we should indulge such a presumption, in view of the fact that section 42, chapter 19, Compiled Statutes (section 2435), provides: "The judges of the district court shall, on the first day of January of each year, fix the time of holding terms of court in the counties composing their respective districts, during the ensuing year." We do not decide that a term of court

comes to an end by operation of law on the last of December in any year; nor that a term of court convened in one year may not continue into another; but what we do decide is that where a judgment is rendered on the 14th of October in one year we will not presume that the term of court at which such judgment was rendered was not finally adjourned until the 23d of July of the succeeding year. The motion to quash the bill of exceptions is sustained.

2. There are three assignments of error in the petition in error filed here. Two of these relate to the sufficiency of the evidence to support the verdict and judgment rendered in the district court, and since the bill of exceptions has been quashed we cannot review the evidence for the purpose of ascertaining whether these assignments of error should be sustained. (*Jones v. Wolfe*, 42 Neb., 272.) The other assignment of error is that the court erred in overruling the motion of plaintiff in error for a new trial. The motion for a new trial contains four distinct grounds. In *Glaze v. Parcel*, 40 Neb., 732, it was held: "An assignment of error in a petition in error that 'the court erred in overruling the motion for a new trial,' such motion containing five separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous." (See, also, *Sigler v. McConnell*, 45 Neb., 598; *Pearce v. McKay*, 45 Neb., 296; *Moore v. Hubbard*, 45 Neb., 612; *Wax v. State*, 43 Neb., 19; *City of Chadron v. Glover*, 43 Neb., 733.) The judgment of the district court must therefore be and is

AFFIRMED.

WILLIAM A. WOLFE V. ROBERT KYD.

FILED NOVEMBER 7, 1895. No. 7445.

Sheriffs and Deputy Sheriffs: FEES: COUNTIES: PLEADING.

Section 42, chapter 28, Compiled Statutes, in relation to compensation of certain county officers and their deputies, construed, and held, (1) to provide that in counties having over 25,000 inhabitants there shall be one deputy sheriff whose salary shall be \$900 per year, and that there may be additional deputies in such counties, but only when found necessary by the county board, and in such case the county board shall fix the number, the time of employment and compensation of such additional deputies, not to exceed \$700 per year; (2) that the principal is not liable absolutely for the payment of his deputies' salaries. Such salaries are to be paid out of the fees earned and collected.

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

George A. Murphy and *William C. Le Hane*, for plaintiff in error, cited: *Minis v. United States*, 15 Pet. [U. S.], 423; *Wayman v. Southard*, 10 Wheat. [U. S.], 30; *Ryan v. Carter*, 93 U. S., 83; *Hagenbuck v. Reed*, 3 Neb., 18; *McCann v. McLennan*, 2 Neb., 286; *State v. Babcock*, 21 Neb., 599; *Washington Market Co. v. Hoffman*, 101 U. S., 112; *State v. Maccuaig*, 8 Neb., 215; *Brown v. County Commissioners*, 21 Pa. St., 37; *White v. Blum*, 4 Neb., 555; *Hawkeye Ins. Co. v. Brainard*, 72 Ia., 130; *Gilman v. Des Moines V. R. Co.*, 40 Ia., 20; *Hatch v. Mann*, 15 Wend. [N. Y.], 45.

L. M. Pemberton, contra, cited: *Gage County v. Wilson*, 38 Neb., 168; *Gage County v. Wilson*, 38 Neb., 165.

IRVINE, C.

Kyd was the sheriff of Gage county. He appointed Ed. J. Wilson as his deputy, and the latter having served

in that capacity ten months, filed his claim against Gage county for salary at the rate of \$75 per month. The county board rejected the claim. The district court, on appeal, allowed it. This court, on error from the district court, reversed the judgment of the district court and affirmed the order of the county board. (*Gage County v. Wilson*, 38 Neb., 168.) This court held that the county was not liable for the payment of the deputy sheriff's salary. Wilson having assigned his claim to Wolfe, the latter brought the present action against the sheriff, to recover the same claim. The case was tried to a jury in the district court and there was a verdict and judgment for the defendant.

This case, like *Gage County v. Wilson*, depends for its solution on the construction of section 42, chapter 28, Compiled Statutes, being section 3043, Consolidated Statutes. The section, as it now stands, is as follows:

"That every county judge, county clerk, county treasurer, and sheriff of each county, whose fees shall in the aggregate exceed the sum of fifteen hundred (\$1,500) dollars each for the county judge and county clerk, and two thousand (\$2,000) dollars each for sheriffs and county treasurer per annum, shall pay such excess into the treasury of the county in which they hold their respective offices; *Provided, however,* That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand (\$3,000) per annum, and shall be furnished by the county commissioners the necessary clerks or assistants whose combined salary shall not exceed the sum of two thousand four hundred (\$2,400) dollars per annum. The sheriff shall receive the sum of two thousand five hundred (\$2,500) dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be nine hundred (\$900) dollars per annum. The county clerks of such counties shall receive the sum of two thousand five hundred (\$2,500) dollars per annum; and he

shall have one deputy whose salary shall be one thousand (\$1,000) dollars per annum. The county judges of such counties shall receive the fees of such office, not to exceed the sum of two thousand (\$2,000) dollars per annum, and shall be provided by the county commissioners with the necessary clerks or assistants, whose combined salaries shall not exceed the sum of one thousand (\$1,000) dollars per annum; *And provided further*, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred (\$700) dollars per year for each of such deputies or assistants, except in counties having over seventy thousand (70,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

When one reads this section one is not surprised that it has given rise to litigation. Its construction is surrounded with difficulty. The plaintiff contends that its proper effect is that in counties having over 25,000 inhabitants (Gage county being of this class) the salary of the deputy is fixed absolutely at \$900 per year, and that the subsequent provisos of the section do not apply; that if the county is not liable for the salary, as held in *Gage County*

v. Wilson, then, necessarily, the sheriff must be personally liable. On the other hand, the defendant contends that the later provisos of the section are applicable; that no deputy is properly appointed or entitled to compensation unless the county board shall have found the appointment necessary, prescribed the number of deputies, the time for which they are to be employed, and their compensation not to exceed the sum of \$700 per year, and that such compensation is to be paid out of fees collected only. As the section stands now, it would certainly be a reasonable construction to say that in counties of over 25,000 inhabitants the deputy's salary is fixed at \$900, and that the last proviso, in regard to the necessity for action by the county board, applies only to counties having over 70,000 inhabitants, but if to others, it does not to counties having between 25,000 and 70,000; but the history of the section renders such a construction untenable. The section, in its substance, was enacted as a part of an act "to regulate the fees of county judges, county clerks, sheriffs, and county treasurers." (Session Laws, 1877, p. 215.) As first enacted, the section was as follows:

"That every county judge, county clerk, county treasurer, and the sheriff of each county, whose fees shall in the aggregate exceed the sum of fifteen hundred dollars each for county judge and county clerk, and two thousand dollars each for sheriffs and county treasurers per year, shall pay such excess into the treasury of the county in which they hold their respective offices; *Provided however*, That in counties having over twenty-five thousand inhabitants the county treasurer shall receive the sum of three thousand dollars per annum, and shall be furnished by the county commissioners the necessary clerks or assistants, whose combined salary shall not exceed the sum of twenty-four hundred dollars per annum. The sheriff shall receive the sum of twenty-five hundred dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy

Wolfe v. Kyd.

shall be nine hundred dollars per annum. The county clerks of such counties shall receive the sum of twenty-five hundred dollars per annum, and he shall have one deputy whose salary shall be one thousand dollars per annum; *And provided further*, That [if] the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants, or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies, not exceeding the sum of seven hundred dollars per year, except as above provided in counties having over twenty-five thousand inhabitants, for each of such deputies or assistants, but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his service; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

It will be observed that as first enacted there was no provision for counties having more than 70,000 inhabitants, but that the last proviso was in the original act, showing that it should be applied generally. The proviso limiting the pay of the deputies to \$700 per year originally contained an exception of counties having over 25,000 inhabitants. By Session Laws of 1885, chapter 51, the section was amended, retaining this exception and inserting the provision now found for county judges and their assistants in counties having over 25,000. By Session Laws of 1887, chapter 44, the section was again amended by reducing it to its present form and striking out the exception of counties having over 25,000 inhabitants from the clause limiting

salaries to \$700 per year. We must assume that this exception was deliberately stricken out and that the legislature by striking it out meant to make the \$700 limitation and the other features of that proviso applicable to counties having over 25,000 inhabitants as well as to other counties. But we do not think that the legislative intent was thereby to abrogate the provision fixing the salary of a deputy in counties of over 25,000 at \$900. If this had been the object that clause would have been stricken out also. The same force must be given to the fact that it was retained as is given to the fact that the exception was stricken out. Bearing this in view we must conclude that the mischief which the legislature sought to remedy grew out of the fact that while in the smaller counties, as the law then stood the county boards might provide any necessary number of deputies subject to the \$700 limitation, power to do so was by the exception restricted to counties of less than 25,000, and therefore the larger counties were compelled to do with one deputy regardless of their necessities. If we are correct so far, it follows that for counties having over 25,000 inhabitants one deputy is absolutely provided for at a salary of \$900 per year, and when required and when found necessary by the county board and when the time of employment and compensation not to exceed \$700 per year have been fixed by the county board, additional deputies may be appointed. But it is clearly contemplated by the section that the principal is not liable personally and absolutely for the payment of this salary. The section provides, as said in *Gage County v. Wilson*, 38 Neb., 165, not for making salaried offices, but for fixing a limit beyond which fees received must be paid into the county treasury. Its effect is to authorize the officer to pay from the fees by him received the compensation fixed by statute or by the board of commissioners for his deputies and assistants; in addition to this to retain for himself the sum fixed by the statute as his own compensation, and to require

Dixon v. State.

him to pay the excess into the treasury. It is expressly provided that "in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." Therefore, we think that the salary is not an absolute personal charge against the principal, but is to be paid only out of fees collected. This is the construction which the court has in former cases given the act. (*Gage County v. Wilson*, 38 Neb., 165; *Gage County v. Wilson*, 38 Neb., 168.) The petition in this case merely alleges the official capacity of defendant, his appointment of Wilson, that Wilson performed the duties of his office for ten months, and that his claim had been assigned to the plaintiff. It does not allege that fees to the extent of \$750 were earned or collected during the period, nor that any fees were earned or collected. It is true that on the trial evidence was introduced on this subject; but its admission was objected to on the ground of irrelevancy. It was irrelevant under the pleadings, although such facts should have been pleaded. For want of such allegations the petition did not state a cause of action and the judgment of the district court in favor of the defendant being therefore the only judgment which could be rendered under the pleadings, it must be affirmed without examining the specific assignments of error.

JUDGMENT AFFIRMED.

ARTHUR J. DIXON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. No. 6826.

1. Criminal Law: CONVICTION ON CIRCUMSTANTIAL EVIDENCE.

In criminal cases, as in civil, facts may be established by circumstances as well as by direct evidence, and a verdict of guilty

Dixon v. State.

is supported by the evidence when the circumstances proved lead beyond a reasonable doubt to inferences of the facts essential to establish the defendant's guilt.

2. **Witnesses: CREDIBILITY.** The fact that a witness testified differently in the preliminary examination and on the trial does not require that her testimony on the trial shall be rejected. Her credibility is for the jury.
3. **Accessories.** Sections 1 and 2 of the Criminal Code, so far as they define accessories, are declaratory of the common law. One who is present when the crime is committed, aiding and assisting therein, is, notwithstanding these sections, a principal, although his hand was not the instrument through which the crime was perpetrated.
4. **Abortionists: EVIDENCE.** A defendant in a prosecution for producing an abortion having testified in chief that his acquaintance with the woman on whom the operation was performed was not intimate, it was material and proper cross-examination to show by him that he had been criminally intimate with her.
5. **Criminal Law: INSTRUCTIONS.** While it is the better practice in a criminal case for the trial court to charge the jury in concise and informal language what facts are essential to warrant a conviction, the defendant cannot complain if the court charges the jury in the language of the information that all the allegations thereof are material, no technical or ambiguous language being used.
6. ———: ———: **REPETITIONS: HARMLESS ERROR.** The repetition of a proposition of law in instructions is not reversible error where it has not been of such a character as to prejudice the rights of the accused.
7. **Right of Prosecuting Attorney to Request Instructions.** A prosecuting attorney has the same right as counsel in a civil action to request instructions, and instructions given at the request of counsel are entitled to the same weight as instructions given by the court of its own motion.
8. **Continuance.** Where a continuance is asked for the purpose of meeting evidence unexpectedly adduced by the other party, it must, among other things, be shown that the party seeking the continuance expects to procure evidence to meet the new features, and the nature of such evidence.
9. **Arguments of Counsel: LIMITATION BY COURT: REVIEW.** It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents

Dixon v. State.

no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed.

ERROR to the district court for York county. Tried below before BATES, J.

George B. France and Charles H. Sloan, for plaintiff in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and N. V. Harlan, for the state.

IRVINE, C.

The plaintiff in error was convicted on an information charging him under section 6, Criminal Code, of having in York county on the 22d day of June, 1893, employed in and upon the body and womb of a woman named in the information a certain instrument with intent unlawfully, willfully, and feloniously to destroy a vitalized embryo—in other words, of producing an abortion. Several of the assignments of error go in effect to the sufficiency of the evidence, and by considering this question here a detailed consideration of some other assignments will be rendered unnecessary. The statute under which the information was drawn is as follows:

“Section 6. Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or foetus, at any stage of utero-gestation, any medicine, drug, or substance whatever, or who shall use or employ, or advise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo, or foetus, unless the same shall have been necessary to preserve the life of the mother or shall have been advised by two physicians to be necessary for such purpose, shall in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof,

shall be imprisoned in the penitentiary not less than one nor more than ten years."

It is contended that the evidence was insufficient to prove that the embryo was vitalized; that the operation was not necessary to save the life of the mother, or that it was not advised by two physicians to be necessary for that purpose; and further, that there was no evidence that the defendant committed the act.

The first two objections may be considered together. The evidence tended to show that the mother had been criminally intimate with the defendant; that she became pregnant and informed the defendant of that fact; that he had endeavored to induce her to take drugs for the purpose of producing an abortion, and at one time, at least, left with her an instrument which he endeavored to have her use for that purpose; that she had until after the occurrence of this incident been employed at a hotel in Lushton. She left that employment and went to the home of her mother and step-father, where on the night of June 21 she was visited by the defendant, who then informed her that he had procured a physician to perform an operation for the purpose of producing an abortion, and arranged with her to take her out on the following evening, ostensibly to a dance but really for the purpose of having the operation performed. The following evening he came between 8 and 9 o'clock, and it was announced to the girl's mother that on account of the lateness of the hour they would not go to the dance, but would go driving together. They drove away together in a buggy, entered the town of Lushton, drove to the house of the physician, who joined them in the buggy, and the three drove into the country to a point along the railway track where they stopped and dismounted. The defendant took the horses and buggy across the railroad track, and stood there, having declared it his intention to keep a lookout against interruption, while the physician introduced the instrument for the purpose of producing an

abortion, and which did have that effect. The girl's health had to this time been good and there was evidence tending to show that the fœtus, when born, was well developed. This was sufficient to justify a finding that it was alive, or vitalized, especially in view of the expert testimony which was introduced. There is no occasion in the case to enter into a discussion of the burden of proof of the exceptions of the statute. The information charged that this act was not within the exceptions. Assuming under the general rule of criminal procedure that the burden was upon the state to establish every element of the offense beyond a reasonable doubt, and beyond a reasonable doubt to exclude these exceptions, there was evidence sufficient to exclude them. Such evidence was not necessarily by direct testimony *in totidem verbis* of the fact that the operation was not necessary to save the life of the mother, and that it had not been advised by two physicians as necessary for that purpose. In the contemplation of law jurors are sane men capable of drawing inferences while sitting as jurors such as sane and reasonable men draw under other circumstances. They must believe as jurors what they believe as men, and they cannot disbelieve as jurors what as men they believe. The only distinction arising from their position is that as jurors their inferences must be drawn from the evidence in the case and not from extraneous circumstances beyond the evidence. There is affirmative evidence in this case that the woman in question had never been advised that such an act was necessary to preserve her life. There is evidence that down to the time of this event she was a woman of at least ordinarily good health. From these facts and from the other circumstances which the evidence tended to prove, if the direct evidence was to be believed, it was not only a fair inference but it was an absolutely necessary inference that the mother's life was not in danger and that the object of performing the operation was not to save her life but to pre-

vent the birth of a child and to avoid disgrace. The inference was equally strong that no such operation had been advised by physicians in any number as necessary to save her life.

On the question as to whether the defendant performed the operation there are presented for consideration matters both of fact and of law. It appears from the evidence that on the preliminary examination of the defendant the girl had testified that the defendant himself had introduced the instrument and committed the act complained of. On the trial she testified, as heretofore outlined, that the physician had manipulated the instrument; the defendant withdrawing across the railroad track and keeping a lookout. It is argued that under the circumstances her testimony was not entitled to credence. This was a question for the jury. She gave as a reason for changing her testimony that on the way from Lushton to the place where the act was committed she had been cautioned by the defendant, in the physician's presence, that the defendant had agreed to shield the physician, and that if anything happened the whole responsibility was to be placed upon the defendant, and the physician's connection with the case concealed. She thus accounted for her testimony on the preliminary examination, but claimed that she was induced to testify otherwise on the trial by the reproaches of her own conscience and the advice of counsel for the state. Considering the difficulty of her situation this was a plausible explanation. The district judge carefully instructed the jury as to the caution required in weighing her testimony under the circumstances, and the necessity of corroboration. It was for the jury and not for the district judge or for this court to determine whether her testimony on the trial was entitled to belief, and under the circumstances the jury was justified in believing it. As to the matter of law, it is here argued that under an information charging the defendant himself with performing the operation a conviction can

not be sustained upon the evidence of the mother at the trial—that is, that the state, to prove the offense charged in the information, must show that the defendant himself performed the act. Section 1 of the Criminal Code provides that if any person shall aid, abet, or procure another person to commit a felony, the person offending shall be punished in like manner as the principal; and section 2 defines an accessory after the fact as one who, “after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime.” These sections, so far as defining offenses are concerned, are but declaratory of the common law, and do not refer to one who is present when the crime is committed, aiding and abetting the commission thereof. Such a person, at common law and under the Code, is a principal and may be indicted and convicted as such under evidence proving his presence aiding the commission of the crime, although his hand was not the instrument of its perpetration. (*Hill v. State*, 42 Neb., 503; *Walrath v. State*, 8 Neb., 80.)

It is contended in the briefs that several rulings on the admission of evidence were erroneous. Only one is assigned in the petition in error. On the cross-examination of the defendant the state was permitted to prove that a short time before the offense was committed, and well within the period of gestation, defendant had had sexual intercourse with the mother. It is argued that this evidence was incompetent and not proper cross-examination. It was competent, and material at least to show a motive. We need not enlarge on this. It was proper cross-examination, if for no other reason, because in the direct examination the defendant had testified that he had become acquainted with the girl and taken her to a few parties. The evident effect of the direct examination was to show that the acquaintanceship was not very intimate and rather casual. Under such relations the commission of the offense

would be much less probable than under relations of criminal intimacy, and it was entirely relevant to the direct examination to establish the latter fact.

The court in the first instruction given said: "The jury are instructed that the defendant is informed against as required by law, and that the material allegations of the information are as follows;" then, as a part of the same instruction, quoted the whole information, omitting merely the formal commencement and conclusion. This is substantially repeated in the sixth instruction, and the giving of each instruction is assigned as error on the ground that it was the duty of the court to instruct the jury concisely what the material allegations were, or, in other words, what elements it was essential that the state should prove. Where informations involve technical language, or where they contain immaterial allegations, it is no doubt better for the court to eliminate what is immaterial and to avoid technicalities by stating to the jury in concise and unambiguous language the elements necessary to constitute the offense; but this information involved no technical or ambiguous language, and the defendant certainly has nothing to complain of in the fact that the court in effect told the jury that every allegation was material and must be proved by the state. The instruction which was given not only contained within itself every element necessary to the offense, but by plain inference at least it told the jury what the instruction on this subject requested by the defendant omitted—that the state must also prove that the operation was not necessary to save the life of the mother, and that it had not been advised as necessary for that purpose by two physicians.

The fifth instruction given by the court is attacked solely for the reason that it repeated a caution that the jury in weighing the credibility of the witnesses should consider the interest of the defendant in the prosecution. The question thus presented has been several times recently

considered, and it has been held, following prior decisions, that where such repetition has not been of such a character as to prejudice the rights of the accused, it is not reversible error. (*Hill v. State*, 42 Neb., 503; *Carleton v. State*, 43 Neb., 373.) This case falls within the rule stated.

At the request of the state the court charged the jury that if the act complained of had been committed in pursuance of a previous arrangement and agreement between the defendant and the physician that the same should be committed and the physician, in pursuance of such agreement and arrangement, employed the instrument, and Dixon was then and there present watching to prevent surprise, or in any other way to assist in the commission of the act, then he would be responsible as though he himself had used the instrument. So far as this instruction involves a question of law, it has already been considered in connection with the sufficiency of the evidence. But it is also argued that there was no evidence whereon to found it. There was, however, evidence tending to show that the defendant told the girl the evening before the crime that he had arranged to have this particular physician commit it; that he drove the girl into town and the physician entered the buggy with them; that on the way to the place where the crime was committed the matter was talked over among them, the conversation indicating that there was an understanding between defendant and the physician on the subject. This was certainly sufficient foundation in the evidence for the instruction.

The court gave the following instruction: "Instructions asked and given by the court upon the motion of the state, or upon the motion or request of the defendant, should have the same weight with the jury, and the jury should be guided thereby just the same as if given by the court." It is argued that in a criminal case the prosecuting attorney has no right to request instructions, and that, therefore, this instruction should not have been given. We know

no principle of law, of no statute, and of no consideration of policy which prevents the prosecuting attorney in a criminal case from submitting to the court a request for any instruction which he thinks well founded in law and applicable to the evidence. A prosecuting attorney, with proper sense of his duty, stands, of course, not entirely in the attitude of counsel in a civil action. It is his duty to enforce the criminal law. It is not his duty to procure a wrong determination of questions of criminal law or to urge a wrongful conviction. It is not the duty of counsel even in civil cases to endeavor to procure a distortion of the law, but a prosecuting attorney may, owing to his independent position, be expected to exercise a more dispassionate judgment and assume a less partisan attitude; but he has the right, and it is his duty, to request such instructions as he believes present the principles of law applicable to the evidence, and having requested them the court in giving them adopts such instructions as its own. Instructions given at the request of counsel should have the same, no less and no more, force than instructions given by the court of its own motion and it is not error to so tell the jury.

The prosecuting attorney, with commendable candor, stated in opening the case the effect of the mother's testimony on the preliminary examination, and the fact that she would on the trial testify differently. Thereupon the defendant requested a continuance to meet the case as then disclosed. This application was refused. In the showing made it was not disclosed in what respect the defense expected to be able to meet the new phase of the evidence or the names of the witnesses by whom it was to be met. In order to procure a continuance it should be shown that the party seeking the continuance expects to be able to procure material testimony, and the nature of such testimony. This not being shown, there was no error in refusing the continuance. When both sides had rested the court made an

Boyes v. Summers.

order giving to the state forty minutes to open its case and fifty minutes to close, and to the defense, to one counsel sixty minutes and to the other counsel forty. This limitation and distribution of time was excepted to. This was a matter within the discretion of the trial court. It is not shown that the argument was unduly restricted, and it is not shown that even the time allotted to defendant was consumed. Under such circumstances there is no error apparent. (*Hart v. State*, 14 Neb., 572.)

JUDGMENT AFFIRMED.

HIRAM BOYES V. WILLIAM R. SUMMERS ET AL.

FILED NOVEMBER 8, 1895. No. 5257.

1. **Manner of Presenting Constitutionality of Statute.**
When this court is asked to declare a statute unconstitutional, the particular section of the constitution which it is claimed the law infringes should be pointed out in the brief filed.
2. **Chattel Mortgages: METHODS OF SATISFYING LIENS OF RECORD.** By section 15, chapter 32, Compiled Statutes, two modes are prescribed for discharging chattel mortgages, viz.: By an entry by the mortgagee, his agent or assignee, on the margin of the index, duly attested by the county clerk; and by the county clerk, when authorized so to do by a written order signed by the mortgagee and attested by a justice of the peace, or some officer having a seal.
3. ———: ———. An order to the county clerk to release a mortgage is invalid, as a release, unless attested as above stated.
4. ———: **FAILURE TO ENTER SATISFACTION: PENALTY.** Under section 15, chapter 32, Compiled Statutes, a mortgagee is liable for the damages therein specified for failure to satisfy of record a chattel mortgage within the period therein named, after demand and the payment of mortgage debt, whether the mortgagee acted in good faith or not, or whatever may have been the motives of such mortgagee. A mere mistake or ignorance, without a corrupt intent, is no defense to such an action.

ERROR from the district court of Garfield county. Tried below before HARRISON, J.

Coffin & Stone, for plaintiff in error.

Clements Bros., Charles A. Munn, and John H. Evans, contra.

NORVAL, C. J.

This is an action by William R. Summers and Albert B. Summers, partners doing business under the firm name of Summers Bros., against Hiram Boyes, under the provisions of section 15, chapter 32, Compiled Statutes, to recover the sum of \$50 for failure to discharge a chattel mortgage. From a verdict and judgment in favor of the plaintiffs for the above amount, defendant prosecutes error to this court.

At the commencement of the trial the defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action. By the objection it was intended to raise the constitutionality of said section 15, and, doubtless, the validity of said law might be brought to the attention of the court in that mode. The only reference made in the brief of plaintiff in error to the validity of the statute, or to the ruling upon the objection taken in the court below to the sufficiency of the petition, is the following paragraph: "This, as we understand, was intended by counsel who tried the case for defendant in the court below to raise the question of the constitutionality of the law under which plaintiff was seeking a recovery. We submit the same upon that theory." The foregoing is insufficient to call our attention to the particular constitutional provision which it is claimed the law in question contravenes. The constitution of this state contains eighteen articles, each of which, except the second, fourth, and twelfth, is composed of several sections.

Whether the statute authorizing the recovery by the mortgagor of a fixed sum for the failure of a mortgagee to release of record a chattel mortgage after the debt thereby secured has been paid is repugnant to some provision of the bill of rights, the article in the fundamental law relating to suffrage, the one upon the subject of education, or some one of the sections of article 3 restricting the powers of the legislature in the mode of enacting laws, we are left solely to conjecture. The constitution of Nebraska is too lengthy for us to attempt to review and consider all of its provisions in a single opinion, and counsel having failed to point out the particular section thereof which it is claimed the law infringes, we will dismiss the subject without consideration.

The first assignment of error is as follows: "The court erred in giving paragraphs 1, 2, 3, and 3½ of the instructions." The only criticism made in the brief is upon the second instruction given by the court on its own motion. No exception was taken in the court below to the instruction numbered 1, nor was the giving thereof assigned as error in the motion for a new trial. Besides, it merely, and, we think very fairly, stated to the jury the issues to be tried as presented by the pleadings. There being no reversible error in the giving of one of the instructions included in the group covered by the first assignment, we very properly might, under the decisions of this court, decline to consider the second instruction. We are, however, satisfied that it is free from criticism. It is as follows: "You are instructed that the laws of this state provide that a chattel mortgage, when satisfied, shall be discharged by an entry by the mortgagee, his agent or assignee, on the margin of a book or index in which the filing of the mortgage has been entered as provided by law, such discharge to be attested by the clerk. It is also provided that the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mort-

gagee thereof, and attested by a justice of the peace or some officer with a seal; and it is further provided that any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who for the space of ten (10) days after being requested shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs or assigns, in the sum of fifty (50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action." This instruction, in every material respect, is a literal copy of the section of the statute under which this action is brought (Comp. Stats., ch. 32, sec. 15), and therefore it cannot be claimed to be incorrect as an abstract proposition of law. It is argued that the portion of the instruction relating to the recovery of actual damages for the failure to release a mortgage should not have been given, since the action is to recover the fixed statutory damages alone. A sufficient answer to this contention is that the instruction did not tell the jury that such damages were recoverable in this suit; but by the third instruction the jury, in express terms, were directed, in case they found a verdict for the plaintiffs, to assess their damages at \$50, the sum named in the statute. The defendant could not have been prejudiced by the instruction of which complaint is made, nor did any injury in fact result therefrom, since statutory damages alone were allowed by the jury. Instructions are to be considered as a whole.

The next assignment is that the court erred in giving instruction No. 1 asked by the plaintiffs, which reads thus: "If you find from the evidence in this case that the release claimed to have been executed by Hiram Boyes, the defendant in this case, was signed by the defendant Hiram Boyes, but was not attested by a justice of the peace or some officer with a seal, then and in that case you are in-

structed that the receipt would not have authorized the county clerk to have released the mortgage in question and would not have been a valid release under the statutes of the state of Nebraska." In the brief filed we are not informed in what particular the foregoing charge is claimed to be faulty, nor have we, after a careful scrutiny of the language employed, been able to discover wherein it is erroneous. By section 15, chapter 32, Compiled Statutes, two modes are prescribed for the releasing of record chattel mortgages, viz.: One by an entry by the mortgagee, his agent or assignee, on the margin of the index, attested by the county clerk; and the other by the county clerk, when authorized so to do by an order in writing, signed by the mortgagee and attested by a justice of the peace or some officer having a seal. It was by the last method that it was insisted on the trial the mortgage had been discharged, and the rule laid down by the court in the instruction is in line with the statute, as well as applicable to the evidence in the case.

The third assignment is predicated upon the refusal of the court to give the defendant's first and fifth requests. The refusal of said requests is not available to the plaintiff in error, for the reason no complaint of the action of the court in that regard was made in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 23; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb., 123.)

The next assignment, that the court erred in overruling the motion for a new trial, is unavailing, since it is too indefinite, the motion being based upon several grounds. (*Glaze v. Parcel*, 40 Neb., 732; *Sigler v. McConnell*, 45 Neb., 598.)

The assignments of error relating to the decisions of the court upon the admission and exclusion of testimony will not be considered, for the reason no particular ruling of the trial court is especially pointed out in the petition in error, the assignments therein being: "Errors of law occurring at

the trial duly excepted to at the time by plaintiff in error," and "The court erred in receiving certain evidence offered by the plaintiffs over the objection of the defendant, duly excepted to at the time, and which more fully appears from the evidence." These assignments are too general to present any question for review. (*Lowe v. City of Omaha*, 33 Neb., 587, and cases there cited.)

The remaining assignment to be considered presents the question of the sufficiency of the evidence to sustain the verdict of the jury. On the 22d day of May, 1888, defendants in error executed and delivered to plaintiff in error a chattel mortgage upon certain personal property, to secure the payment of \$20 in thirty days. The indebtedness was fully paid to Boyes at maturity, by Albert B. Summers, one of the plaintiffs below. There is also evidence tending to show that twice during the month of July, following the payment of the mortgage indebtedness, demand was made upon the plaintiff in error that he release and discharge the mortgage of record. It is also disclosed that at the time the note was paid off Mr. Boyes executed in writing and delivered to A. B. Summers an order directed to the county clerk requesting that he surrender the mortgage to defendants in error and cancel the same of record. This order, however, was not attested by any officer; therefore, under the statute, it was of no validity whatever. This is too plain to admit of argument. It is insisted that plaintiff in error acted in good faith in the matter, and that his refusal to satisfy the mortgage of record was not wanton and oppressive, hence there can be no recovery. Admitting the premises to be true, the conclusion drawn therefrom does not necessarily follow, although there are authorities in other states which support the construction of the statute for which plaintiff in error contends. Mr. Boyes is not only presumed, but is bound, to know that the law required that the order which he gave requesting the county clerk to satisfy the mortgage must be attested by either a

Perkins v. Butler County.

justice of the peace or some officer with a seal of office. A mistake of law excuses no one. So, too, the fact that Mr. Boyes acted in good faith, relying upon the fact that the plaintiffs below had accepted the order, and had not returned the same to him as being invalid, is no justification. This court has held, in an action against an officer to recover the penalty imposed by statute for exacting illegal fees, that a mere mistake or ignorance, without a corrupt intent, is no defense (*Cobbey v. Burks*, 11 Neb., 157; *Phoenix Ins. Co. v. Bohman*, 28 Neb., 253); and in *Clearwater Bank v. Kurkonski*, 45 Neb., 1, it was ruled that the entry of satisfaction of a chattel mortgage after the period fixed by law will not defeat an action to recover the statutory damages. By the statute relating to the release of chattel mortgages, the action therein provided for accrues by the mere failure to satisfy the mortgage within a certain time after payment and demand is made, whether the mortgagee acted in good faith or not, or whatever may have been the motives of the mortgagee. Upon principle, we must hold that the plaintiff in error has no defense to the action. This conclusion is in harmony with our decisions in analogous cases. The judgment is

AFFIRMED.

HARRISON, J., took no part in the decision.

B. O. PERKINS ET AL., APPELLANTS, V. BUTLER COUNTY
ET AL., APPELLEES.

FILED NOVEMBER 8, 1895. No. 5659.

1. **Insolvent Partnership: RIGHTS OF CREDITORS AND PARTNERS: DISTRIBUTION OF ASSETS.** The order for a rehearing in this case was as follows: "Rehearing allowed on the following question: Is this case, in view of the pleadings and the evidence, one calling for the application of the rule whereby partnership

assets are to be applied to the payment of partnership debts in preference to debts of an individual partner?" Upon a re-examination of the case the conclusion of the opinion rendered at the former hearing in relation to the question for consideration on rehearing, approved and adhered to. (For opinion see *Perkins v. Butler County*, 44 Neb., 110.)

2. ———: ———: ———. The points decided at the first hearing of the case having been then set forth in the syllabus of the opinion, they need not and will not be restated here.

REHEARING of case reported in 44 Neb., 110.

George P. Sheesley, R. S. Norval, and George W. Lowley, for appellants, cited: *Smith v. Smith*, 43 Am. St. Rep. [Ia.], 359, note, and cases cited.

Leese & Stewart, also for appellants.

Steele Bros., Evans & Hale, M. A. Hall, and Frick & Dolezal, contra.

HARRISON, J.

An opinion was filed in this case February 20, 1895, and was published in 44 Neb., 110. A motion for rehearing was filed, and on April 18 was sustained, the following being the order entered: "Rehearing allowed on the following question: Is this case, in view of the pleadings and the evidence, one calling for the application of the rule whereby partnership assets are to be applied to the payment of partnership debts in preference to debts of an individual partner?" In the decision of the case at the former hearing in this court this question was considered and determined, and it was then held: "When a partnership is dissolved and is insolvent, its assets will be treated by a court of equity as a trust fund for the payment of partnership creditors, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors;" and the rule announced applicable to the issues

Monroe v. Reid.

in the case as presented by the pleadings and the evidence. We have carefully re-examined the entire record, more particularly for the purpose of determining the question hereinbefore indicated, and, without entering into a discussion of it, or stating at length the reasons which have moved us to the conclusions we have reached, will say that our consideration of the case at this time has resulted in verifying the correctness of the opinion rendered at the former hearing, in holding the rule appropriating partnership assets to the payment of partnership debts applicable in this case as it was developed by the pleadings and evidence. Hence we will adhere to the former opinion. The judgment is

REAFFIRMED.

NORVAL, C. J., dissenting.

E. H. MONROE V. REID, MURDOCK & COMPANY ET AL.

FILED NOVEMBER 8, 1895. No. 6215.

1. **Appeal and Error: ELECTION AS TO REMEDY: WAIVER OF APPEAL.** A case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and having filed a petition in error, must be presumed to have selected that remedy.
2. **Pleading: AMENDMENTS.** The amended petition in this case does not state a new and different cause of action from that set forth in the original petition, and objections to it on that ground were properly overruled by the trial court.
3. **Fraudulent Conveyances: ACTION FOR CANCELLATION: EQUITY.** This action, as disclosed by the pleadings, was to set aside an alleged fraudulent transfer of property and reach and appropriate to the payment of judgments against the debtor his moneys or property claimed to have been concealed, and was equitable in its nature and triable by the court without the intervention of a jury.

4. ———: ———: PROCEEDINGS IN AID OF EXECUTION. The right to such an equitable action existed prior to the enactment of the statute providing for proceedings in aid of execution, and still exists. The statutory remedy did not supersede or destroy it.
5. ———: ———: FINDING FOR PLAINTIFF. The evidence examined, and *held* sufficient to support the findings of the trial court.
6. Trial to Court: ADMISSION OF INCOMPETENT EVIDENCE: HARMLESS ERROR. In trials of fact to the court without the intervention of a jury, if sufficient competent evidence is admitted to sustain the findings of the court, the case will not be reversed on the ground of the admission of immaterial and incompetent evidence.
7. Actions: PLEA IN ABATEMENT. The plea in abatement of another action pending in the same court between the same parties, regarding the same subject-matter and in which the relief sought is practically the same, is a good defense to a second action, and the fact that one is an action at law and the other in equity is immaterial.
8. ———: ———: PLEADING AND PROOF. To constitute a good defense, however, it is necessary for the party seeking the abatement of the present action, by reason of the pendency of that already commenced, to plead and prove the connection of the former action to the same subject-matter, the relations of the parties therein to be the same as that in the case in which the plea is interposed, and that the relief sought is practically identical with that sought in the second action.

ERROR from the district court of Dodge county. Tried below before MARSHALL, J.

D. B. Carey and E. F. Gray, for plaintiff in error.

H. J. Whitmore, Montgomery, Charlton & Hall, and *Fred W. Vaughan*, *contra*.

HARRISON, J.

On the 1st day of April, A. D. 1892, the defendants in error filed a petition in the district court of Dodge county, in which was stated the business in which each was en-

gaged during the occurrences and circumstances set forth in the pleading, connected with the elements of the cause of action; that Reid, Murdock & Co., during the time one Frank H. Scott was in business as stated, sold to him, on credit, quantities of goods and merchandise, and on December 18, 1891, obtained two judgments against him for the amounts of their bills, one for \$612.87 and one for \$331.90, upon which executions were thereafter issued, which, on December 19, 1891, were returned unsatisfied for want of property of the judgment debtor on which to levy; that proceedings in aid of execution were instituted, and E. H. Monroe was summoned to appear therein and answer. It was further recited that Raymond Bros. & Co. had an account against Frank H. Scott in the sum of \$541.27; the Lincoln Packing & Provision Company, a balance due on account in the sum of \$95.08; Z. T. Leftwich, an account in amount \$516, each of which was, by the party to whom it was due, prosecuted to judgment, execution issued and returned unsatisfied, "No property found," and in proceedings in aid of execution E. H. Monroe had been summoned to appear and answer; that on September 30, A. D. 1891, Frank H. Scott of defendants was married to the daughter of E. H. Monroe, another of defendants, and it was further averred:

"That on the 14th day of July, 1891, the said defendant Frank H. Scott, being then the owner of and in possession of a stock of goods, wares, merchandise, and fixtures to the value of upwards of \$8,000, and being fully able to pay all of his indebtedness, and being indebted to these plaintiffs as aforesaid, and to divers other persons in large amounts, did, for the purpose of hindering and delaying these plaintiffs and others of his creditors in the collection of their demands, and unlawfully, willfully, and fraudulently designing to cheat and defraud these plaintiffs in the collection of their demands, the said Frank H. Scott on said day sold and conveyed to his said father-in-law, the said defendant

E. H. Monroe, the whole of said stock of goods, wares, merchandise, and fixtures, and, as plaintiffs are informed and believe, received therefor from the said E. H. Monroe the sum of \$3,700 in money in cash in hand, and three promissory notes of the said E. H. Monroe payable to the order of said Frank H. Scott and dated July 14, 1891, as follows: One note for \$1,000, due in sixty days from date; one note for \$1,300, due in ninety days; and one note for \$1,000, due in four months from date, each of said notes bearing interest from date at the rate of eight per cent per annum; that shortly after the said sale and conveyance aforesaid the said Frank H. Scott, with fraudulent intent and purpose as aforesaid, and for the purpose of placing the said notes and money so received beyond the reach of these plaintiffs and others of his creditors, secretly departed from the city of Fremont and went to the state of Colorado, taking with him the said notes and money; that he was soon followed to said state of Colorado by his father, the said defendant Pliny Page Scott, and that said notes were by the said Frank H. Scott placed in the possession and keeping of said Pliny Page Scott in the city of Denver, and, as plaintiffs are informed and believe, the second and third of said notes are still in the possession of said Pliny Page Scott.

“Plaintiffs further say that they are informed that the said Pliny Page Scott now pretends to be the owner of said two notes and refuses to return the same to the said Frank H. Scott. These plaintiffs aver that the said Pliny Page Scott knew at the time of said sale that the same was being made, and that the said Frank H. Scott was indebted as aforesaid and that the creditors of said Frank H. Scott had not been paid, that said notes were delivered to him without consideration and for the fraudulent purpose aforesaid, and that Pliny Page Scott has no right, title, or interest in or to said notes.

“Plaintiffs further say that, as they are informed, the

defendant C. B. Morrow claims some interest in said notes, or, if he makes no such claim, that he claims possession thereof, but these plaintiffs allege that if the said C. B. Morrow has said notes in his possession they are held by him fraudulently and without consideration on his part, and with knowledge on his part of the fraudulent intent as aforesaid of the defendant Frank H. Scott to cheat and defraud the plaintiffs and his other creditors by placing the notes beyond their reach.

"Plaintiffs further say that the defendant E. H. Monroe now refuses to pay the said notes to the said Frank H. Scott, or to pay the proceeds thereof to these plaintiffs into court to be applied to the payment of plaintiffs' said judgment; that the said Frank H. Scott is wholly insolvent and has no property liable to execution to satisfy said judgments, and these plaintiffs are without adequate relief at law, and that the fund in the hands of the said E. H. Monroe, and due on the said notes, is all the property of said defendant Frank H. Scott out of which plaintiffs' said judgments can be satisfied."

The prayer of the petition was as follows:

"These plaintiffs therefore pray judgment against the said E. H. Monroe for the amount of their said judgments, interest, and costs; that the said Pliny Page Scott and C. B. Morrow be required to bring said notes into court that the same may be canceled, and that the said E. H. Monroe be enjoined from paying the said notes to the said Frank H. Scott, or to Pliny Page Scott, or C. B. Morrow, or to any person whomsoever until the further order of this court, and that the said Frank H. Scott be enjoined from disposing of the said notes and from canceling or destroying the same; that said notes be decreed to be the property of said defendant Frank H. Scott, and the proceeds thereof liable to the payment of plaintiffs' said judgments, with interest and costs thereof; and plaintiffs further pray for such other and further relief as may be just and equitable."

A temporary injunction was allowed and the required bond filed and approved. E. H. Monroe filed an answer in which the allegations of the petition in relation to defendants in error, the business in which they were respectively engaged, the existence of the indebtedness of Frank H. Scott to each and the judgments obtained, the issuance and return of the executions, the institutions of the proceedings in aid of execution were admitted, and it was stated in relation to the supplemental proceedings that in all the cases the answers had been made and the answering party discharged, except in that of Z. T. Leftwich, of which it was alleged there had been no hearing. The marriage of Scott and Monroe's daughter is stated to have occurred December 30, 1891, and not September 30, 1891, as pleaded in the petition. The purchase of the stock of goods by Monroe for the consideration of \$7,000, the cash payment and execution and delivery of notes for the balance are admitted, but it is denied that the goods were worth more than the amount for which they were sold, and it is further denied that the sale was made to hinder, delay, or defraud creditors of Scott, or to cheat them, or that there was any fraud, secrecy, or conspiracy connected with the placing and keeping the money paid and notes delivered as a consideration for the sale of the goods to Monroe. The allegations of the petition as to Scott's insolvency are also denied, and it is further pleaded:

"This answering defendant alleged that his purchase price of said stock of goods of Frank H. Scott was \$7,000, and on said purchase, about July 14, 1891, he paid said Scott \$3,700 in cash, and delivered him his three negotiable promissory notes, one for \$1,000, due in sixty days from date, and one for \$1,300, due in ninety days from that date, and one for \$1,000, due in four months from date, each bearing interest at eight per cent from date; that said sixty-day note this answering defendant paid to said Scott shortly before due and took the same up; that the other two

of said notes this answering defendant, on March 28, 1892, paid to C. B. Morrow, who was then, and from before either of them became due had been, the owner and holder of them for value, and upon said payments said answering defendant took up said two notes, and this answering defendant owes nothing on said purchase, and did not owe anything on said purchase at the commencement of this action. This answering defendant denies each and every allegation in said petition not above admitted."

The reply to this answer was in effect a general denial of all new matter stated in the answer. The defendants in error made application to file an amended petition, which was objected to by plaintiff in error on the following grounds:

"1. Said proposed amended petition sets up a new and different cause of action from that set up in the original petition.

"2. Said proposed amendment sets up matter irrelevant to the matter set up in the original petition and in no way an amendment of the original petition, and sets up matter not triable except at law to a jury.

"3. Said proposed amended petition is an abandonment of the original cause of action and an attempt to set up a new cause of action triable to a jury at law in place of the equitable cause of action originally set up.

"4. Said proposed amended petition is filled with irrelevant matter, redundant matter, surplusage, and its allegations are indefinite and uncertain, and several different causes of action are not separately stated and numbered."

The objections were overruled and the defendants in error allowed to file the amended petition. A motion was then filed for plaintiff in error to strike the amendment from the files, which was overruled. The allegations of the amended petition in regard to the accounts of defendants in error against Frank H. Scott, the obtaining judgments, issuance, and return of executions, proceedings in

aid of the executions, and the relationship between Frank H. and Pliny Page Scott, E. H. Monroe, and C. B. Morrow, etc., were similar and in effect the same as the original petition, and it was further pleaded:

"These plaintiffs further allege that on the 14th day of July, 1891, the said Frank H. Scott was the owner of and in possession of a stock of goods, wares, merchandise, and fixtures of the value of upwards of \$8,000, and was solvent and fully able to pay all his indebtedness in full.

"12. Plaintiffs further allege that on or about the said 14th day of July, 1891, the said defendants Frank H. Scott, E. H. Monroe, and Pliny Page Scott entered into an unlawful and fraudulent conspiracy and combination to defraud these plaintiffs and others of the creditors of the said Frank H. Scott and to hinder and delay them in the collection of their demands against the said Frank H. Scott.

"13. That in pursuance of the said unlawful and fraudulent conspiracy and combination against the rights of these plaintiffs the said Frank H. Scott did, on said 14th day of July, 1891, falsely pretend to sell and transfer his said stock of goods, wares, merchandise, and fixtures to the said E. H. Monroe, and the said E. H. Monroe did falsely pretend to purchase the same, and did take immediate possession of the same, and has since sold and disposed of the same and received and still holds the proceeds of the said sale.

"14. That it is claimed by said defendants that said pretended sale was for the sum of \$7,000 and that \$3,700 of said consideration was paid by said E. H. Monroe to said Scott in cash, and that \$3,300 of said pretended consideration was in three promissory notes of said Monroe, as follows: One for \$1,000, due in sixty days from date; one for \$1,300, due in ninety days from date; and one for \$1,000, due in one hundred and twenty days from date, all bearing interest from date at the rate of eight per cent. per annum.

Monroe v. Reid.

"15. Plaintiffs further aver that in pursuance of said unlawful and fraudulent conspiracy and combination, and to carry the same into effect, the said Frank H. Scott did, shortly after the said pretended sale, secretly depart from the said city of Fremont, and, as plaintiffs have since learned, went to the state of Colorado and took up his residence with the defendant Morrow; that shortly thereafter the said defendant Pliny Page Scott also secretly left the city of Fremont, and, as plaintiffs have since learned, also took up his residence with defendant Morrow in the city of Denver.

"16. That it is now claimed by the said defendants that the said notes so alleged to have been executed by the said Monroe were by the said Frank H. Scott taken to the city of Denver and there delivered to the defendant Pliny Page Scott, who it is alleged thereupon sold and delivered two of the said notes to the said defendant Morrow, who now claims to be the owner and holder thereof. These plaintiffs aver that if any such notes were executed and delivered by the defendant Monroe to the defendant Frank H. Scott that the same were executed and delivered for the purpose of cheating and defrauding these plaintiffs and others in the collection of their demands, and that if said notes were taken to Denver and delivered to the said Morrow, that the same was done for the purpose of carrying out said fraudulent intent; that said notes were transferred for no consideration and were taken by said Morrow with full knowledge of said fraudulent intent and for the purpose of aiding and abetting the perpetration of the said fraud; that the said Morrow was, at the time of the alleged purchase of the said notes by him, employed as a railroad conductor on the Burlington & Missouri railroad, was a man of no means and wholly unable to purchase the said notes and pay the consideration claimed to have been paid therefor; that the said Pliny Page Scott was a man of no means, said notes were placed in his possession without considera-

tion, and solely for the purpose of carrying out said fraudulent conspiracy and combination, of all of which the said Pliny Page Scott was fully informed.

"17. Plaintiffs further allege that the defendant E. H. Monroe now refuses to pay the said notes given, or alleged to have been given, to the said Frank H. Scott, or to apply the proceeds of said notes to the payment of these plaintiffs' claims or to pay said money into court for such purpose; that the said Frank H. Scott is wholly insolvent, and has no property liable to execution to satisfy said judgments, and these plaintiffs are without adequate relief at law, and that the fund in the hands of the said E. H. Monroe, alleged to be due on said notes, is all the property of said Frank H. Scott out of which these plaintiffs' said judgments can be satisfied."

The prayer for relief did not differ materially from that of the original petition. The answer of Monroe to the amended petition contained admissions of such facts as had been alleged in the original petition and admitted by the answer thereto, and they need not be restated here in detail. It pleaded affirmatively the purchase of the stock of goods by Monroe for a consideration of \$7,000, the payment of a portion thereof in cash and the execution of the notes for the amount of the balance, that such purchase and sale were in good faith, and denied, either generally or specifically, all allegations of the amended petition in reference to conspiracy, fraud, intention to hinder, delay, or defraud creditors as connected with the sale of the goods, the money paid therefor, the notes or their delivery from Frank H. Scott to the father, Pliny Page Scott, and by him to Morrow, or lack of consideration for any or all of them, and states affirmatively his payment of one of the notes to Frank H. Scott, and on March 28, 1892, of the other two to C. B. Morrow, and further as follows:

"And for a second ground of defense and answer to the amended petition, defendant E. H. Monroe, answering for

Monroe v. Reid.

himself only, states that as to the plaintiff Reid, Murdock & Co. they have another action pending in this court between themselves and Frank H. Scott, in which they caused a large portion of the said goods sold by Scott to Monroe to be attached to satisfy their judgment set up in said amended petition, and that this answering defendant thereafter commenced a replevin action in this court, and therein replevied said attached goods and gave the usual redelivery bond thereupon, and said replevin action is still pending in this court undetermined, and said plaintiff ought not to be allowed to maintain this action.

"For a third ground of defense and answer to the amended petition the said E. H. Monroe, for himself only, states that the garnishee proceedings and proceedings in aid of execution commenced against him by the said several plaintiffs, as alleged in said amended petition, have been fully heard and determined in the courts where the same were pending, and each and all of said proceedings and garnishments have been duly dismissed, and this answering defendant duly discharged therefrom and in the premises, and the matters embraced in this action have been fully determined in said garnishee and aid of execution proceedings on the merits and this answering defendant duly discharged in the premises, and therefore the plaintiff ought not to be permitted to maintain this action."

When the case was called for trial a jury trial was demanded for plaintiff in error. This was refused and an exception noted. The result of the trial was a finding and judgment against Monroe, and he has brought the case to this court for review. A motion for new trial was filed in the district court and a petition in error filed with the record in this court. The case was one which could have been appealed, and counsel for plaintiff in error, judging from a statement in the brief filed, view the case as here by appeal and by proceedings in error, and that it can be so considered. "This course is not permissible. A party must

elect which remedy to pursue, and having filed a petition in error, she must be presumed to have selected that remedy. The case will, therefore, be treated as a proceeding in error." (*Woodard v. Baird*, 43 Neb., 311.)

The question to which we will next direct our attention is, did the trial court err in overruling the objections to the amended petition, or did it state a new and different cause of action than was pleaded in the original petition? We do not think so. In the original petition the sale of the stock of goods was alleged to be fraudulent as to creditors, and it was further set forth that Frank H. Scott, Pliny Page Scott, his father, and C. B. Morrow, a brother-in-law, were seeking to secrete and dispose of the money or other proceeds of the sale, that it could not be reached by the creditors of Frank H. Scott or appropriated to the payment of his debts. In the amended petition the same elements were included in the cause of action, the statements in the pleading concerning them being somewhat amplified, and it was further alleged that the apparent transfer of the goods to Monroe, and his taking possession of them, and the pretended sale to him, were but acts in furtherance of the main design, the defrauding of the creditors of Frank H. Scott, in which Monroe was actively co-operating. This did not change the cause of action nor was a new one stated. The matters complained of in each petition were the alleged simulated sale and transfer of the stock of goods and the consequent fraud upon the creditors.

Another question is, did the trial court err in refusing the demand of plaintiff in error for a jury trial? The action, as disclosed by the petition and issues presented by the pleadings at the time this point was raised and decided, was one to set aside an alleged fraudulent transfer or sale, and to reach and appropriate to the payment of the judgments against the debtor his moneys or property which it was claimed was by certain devices concealed, so that it could not be made available for such purpose by the ordi-

nary methods, and was equitable in its nature, and hence triable by the court without the intervention of a jury.

It is urged that the defendants in error could have obtained full relief under the proceedings in aid of execution. The record discloses that the supplementary proceedings were prosecuted so far as to obtain the answer of Monroe, after which the court discharged him, and it is claimed that the defendants in error, in further pursuance of the statutory remedy in aid of execution, might have instituted an action at law against Monroe and litigated the questions involved in the case at bar. The right to the equitable action to determine the controversies existed prior to the enactment of the statute which provided the supplemental proceedings, and still exists. The statutory remedy did not supersede it or destroy it. We do not think the proceedings in aid of execution were intended to be substituted for actions in the nature of creditors' bills, while they may be made to serve in the main the same purpose, they often furnish an incomplete and imperfect remedy, and where, on the facts, such an action is proper, the one in the nature of a creditor's bill will be entertained. (*Oldenheimer v. Tressel*, 43 N. W. Rep. [Dak.], 941; *Ludes v. Hood*, 29 Kan., 49.)

It is claimed that the evidence was insufficient to sustain the finding and judgment. We have carefully examined and considered all the testimony, and will not in this opinion enter into, or discuss it, but our conclusion is that it was sufficient to support the conclusions and judgment of the trial court, and hence they will not be disturbed. (*Bond v. Dolby*, 17 Neb., 491; *Burlingim v. Warner*, 39 Neb., 497.)

In regard to the assignments of error in relation to the admission of certain testimony, it is argued by counsel on this point "that the evidence having been admitted over objection, the presumption is that the court used and relied on it in making its finding, and for this error the judgment ought to be reversed. To hold otherwise would be to place

the trial court on a plane of infallibility, and say, that notwithstanding it received incompetent evidence, after objection, deliberately, still the presumption is that it discovered its error before judgment and did not consider the incompetent evidence. In other words, it would be to hold that where a cause is tried to the court there shall be no review of erroneous proceedings on the admission of testimony, and that parties litigant are at the mercy of the single judge, as to what testimony shall be received. If we have reached that point we want to know it now." The rule as announced by this court is: "When a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court." (*Richardson v. Doty*, 25 Neb., 420.) In 1 Greenleaf, Evidence, section 49, the rule is laid down as follows: "In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must of necessity be read or heard by the judge in order to determine its character and value. In such cases the only question, in effect, is upon the sufficiency and weight of the evidence." (See, also, *Willard v. Foster*, 24 Neb., 213; *Ward v. Parlin*, 30 Neb., 376; *Tower v. Fetz*, 26 Neb., 710.) A review of the testimony has convinced us that this case is within the rule. Having reached this conclusion, we need not further consider or discuss these assignments.

The plaintiff in error set up as a defense to the amended petition and introduced testimony to show that one of defendants in error, Reid, Murdock & Co., had another action pending in the trial court; that in actions commenced there by Reid, Murdock & Co. attachments had been issued and levied on a large portion of the stock of goods claimed by

Monroe v. Reid.

Monroe to have been by him purchased of Scott, to satisfy the judgments upon which the case at bar was predicated to the extent that the claims of this one party are involved in the action; that Monroe, to protect his rights, had commenced a replevin action in which the goods attached were retaken and in such action had executed and delivered a bond, and that the replevin action was still pending in the district court. In the case at bar, Reid, Murdock & Co., were of parties plaintiff in the district court and Monroe was of defendants. In the replevin action, the pendency of which it was sought to interpose as a defense or in abatement of this action, Monroe was the plaintiff and the officer who levied the attachment was defendant, although this officer's right to the property was based on the writ of attachment, and the rights or claims of Reid, Murdock & Co. would necessarily be involved in a trial of the replevin suit, and the character of the transactions between Monroe and Scott, which resulted in the conveyance of the goods to Monroe, whether fraudulent or not, would be fully inquired into and ventilated and the determination of this question be a governing one in the action, as it was in the case at bar, and if a trial of the replevin action resulted in favor of the officer, Reid, Murdock & Co. would be the recipients of the benefits derived from the judgment. If we consider the officer the real party defendant in the replevin action, then its pendency was no defense to the present action, the parties not being identical, as the officer was not a party to this suit. If we look beyond the form of the replevin case and the nominal defendant therein and consider Reid, Murdock & Co. the real party defendant, then the plaintiff in that (Monroe) is a defendant in this suit and the defendant in that is plaintiff in this, or, the parties in the two cases are reversed, and where relative positions in the case are thus changed it has been held that both suits may be in progress at the same time. (*Walsworth v. Johnson*, 41 Cal., 61; *New England Screw Co. v. Bliven*, 3 Blatch. [U.

S.], 240; *Washburn & Moen Mfg. Co. v. Scutt*, 22 Fed. Rep., 710; *Barr v. Chapman*, 5 O. Cir. Ct. Rep., 69. *Contra*: *Crane v. Larsen*, 15 Ore., 349; 1 Ency. Pl. & Pr., 758, note.) It has also been determined that a plea of the pendency of an action at law is not available in an action of equity, and *vice versa*, and that this is also true where law and equity are administered by the same court. (1 Ency. Pl. & Pr., 752, note.) This court has expressed itself in favor of the contrary doctrine in the case of *State v. North Lincoln Street R. Co.*, 34 Neb., 634, the present chief justice writing the opinion. It was said: "It may be safely stated that as a general rule the pendency of a former action between the same parties may be shown in abatement, where a judgment in such suit would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction. That one is an equitable action and the other a suit at law is immaterial, so long as both suits are based upon substantially the same facts. Cases are to be found in the books, some of which are cited in relator's brief, which hold that the plea of the pendency of a prior action is not good when the proceedings are not identical or the forms of the actions are not the same in both suits. In other words, the pendency of an action at law will not abate a suit in equity, and *vice versa*; but such rule is not sustained by the current of modern authorities, and there is no good reason why it should obtain in this state under the Code, where the forms of procedure, which, under the old system of practice, distinguished legal and equitable actions, are abolished." In the discussion of the subject of "Another Suit Pending," in a late work on pleading and practice is the following statement: "But it may be laid down as a general proposition where the substantial fact or facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second action, the first will abate the second, although the actions differ in

Monroe v. Reid.

matters of form, and in the relations of the defendant to the infringement of the plaintiff's right." (1 Ency. Pl. & Pr., p. 763, and see citations in note.) If we say we will look beyond the forms of action and the nominal parties defendant in the replevin case, and hold Reid, Murdock & Co. to be the real party in interest, the reason being that the suit against Scott and the issuance and levy of the writ of attachment on the stock of goods claimed by Monroe, at the instance and by the directions of such party, forced Monroe to commence the action of replevin to protect his rights, the issue in the replevin case merely being was the sale of goods to Monroe fraudulent or in good faith, and its determination settling the question of whether the goods could be sold under the attachment levy and the proceeds appropriated to the payment of the claims of Reid, Murdock & Co., and the issue in the case at bar being in regard to the same transaction and its fraudulent or good faith character, the object of the suit, in so far as it involves the rights of Reid, Murdock & Co. and Monroe to have the transactions between Monroe and Scott held void or set aside and the proceeds of the stock of goods paid on the judgments, which embody the identical claims in suits wherein the writs of attachment were issued, and we have in view the pith of the contention of plaintiff in error under his plea of pendency of another action. It was held in *Yantis v. Burdett*, 3 Mo., 457, that a plea stating that an action on a judgment was commenced while the plaintiff was endeavoring to enforce the same judgment by an execution was good; but whether in the present controversy the conditions and subject-matters of the cases and the relations of the parties to them established the plea and constituted it an available one as to the main element or point involved, is not, as we view the pleading and evidence, sufficiently presented to call upon us to determine it. It is clear that a plea of the pendency of the replevin suit, without any showing of its connection with and being

the outgrowth of the attachments, would have been of no effect as a plea in abating the present action, and it devolved upon the party interposing the plea, to sustain his contention, to sufficiently state and prove all things necessary, not only the replevin action and its pendency, but also, among other matters, that the attachments were in furtherance of the satisfaction of the same claims as were included in the judgments, the basis of this action, and that the attachments were still in existence and force, not abandoned, withdrawn, or discharged. This last he neither pleaded nor proved; hence the plea, even if it could have been sustained, if the question had been fully presented for adjudication, which we do not decide, was not good and must fail. It is true that in a cross-examination of a clerk of the district court the statement was called out that no orders had ever been made dissolving the attachments, but this did not supply the defect in the pleadings or sufficiently show the continued pendency of the attachments. The judgment of the district court is

AFFIRMED.

GILKIE & ANSON COMPANY, APPELLEE, V. DAWSON
TOWN & GAS COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 8, 1895. No. 6590.

1. **CORPORATIONS: LIABILITY OF STOCKHOLDERS.** In all cases of claims against corporations and joint-stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the individual subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock. (Constitution, sec. 4, art. 11, referring to "Miscellaneous Corporations.")
2. ———: **CAPITAL AND SUBSCRIPTIONS: TRUST FUND.** The capital, including unpaid subscriptions for stock of a corporation, is a trust fund for the payment of its creditors.

3. ———: SUBSCRIPTIONS FOR STOCK PAYMENT. Subscriptions for stock of a corporation may be paid in money or in property such as is within the power of a corporation to acquire and hold, or in labor for the corporation in the proper furtherance of its purposes and business.
4. ———: ———: ———. Where payment of subscriptions for stock is made in property or labor, it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock; and if labor, it must be reasonably of the face value of the stock.
5. ———: ———: ———. When property is conveyed to a corporation in payment of subscriptions for stock, it may be at a valuation agreed upon between the parties to the transaction, provided the valuation is one made in good faith or in the fair exercise of judgment and discretion honestly directed.
6. ———: VALUE OF PROPERTY EXCHANGED FOR STOCK: FRAUD: LIABILITY OF STOCKHOLDERS: RIGHTS OF CREDITORS. Where the property conveyed in payment for stock is knowingly and advisedly overvalued, it is but a formal and illusory compliance with the requirements of the law and fair dealing in this regard and is not sufficient, and the transaction may be impeached by a creditor of the corporation as a fraud, and the liability of the subscriber for stock, to the amount of the difference between the fair and true value of the property at the time it was conveyed and the fictitious value at which it was received, be enforced against such subscriber as an unpaid portion of his subscription to the stock and appropriated, in a proper action, to the satisfaction of the debts of the corporation.
7. ———: ———: FRAUDULENT TRANSFER OF STOCK: RIGHTS OF CREDITORS: EVIDENCE: ESTOPPEL. The books of a corporation are its private books, as to third persons, and such persons are not chargeable with notice of what is contained therein, nor with the duty of examining them for the purpose of ascertaining the condition of the capital in respect to whether fully paid in or not and at what valuation, before granting credit to the corporation, to the extent that a failure to do so will bar the right in a proper action to impeach the transfer of stock to a party in consideration of the conveyance to the corporation of property, which may be shown in the books, and prove its fraudulent character.
8. ———: ———: ———: ———: PLEADING. The amended petition held to be sufficient in its statements of the fraudulent character of the transaction therein sought to be attacked.

APPEAL from the district court of Douglas county.
Heard below before HOPEWELL, J.

The opinion contains a statement of the case.

G. W. Ambrose, for appellants:

Fraud will never be imputed when the circumstances and facts upon which it is predicated may consist with honesty and purity of purpose. (Bump, *Fraudulent Conveyances* [3d ed.], 603; *Clemens v. Brillhart*, 17 Neb., 337.)

Where subscriptions for stock are paid in property, a creditor of the corporation who alleges fraud in the transaction must not only prove that there was an overvaluation of the property, but must prove also that such overvaluation was intentional. (*Douglas v. Ireland*, 73 N. Y., 100; *Schenck v. Andrews*, 57 N. Y., 133; *Boynton v. Andrews*, 63 N. Y., 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y., 87; *Brant v. Ehlen*, 59 Md., 1; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass., 349; *Coffin v. Ransdell*, 11 N. E. Rep. [Ind.], 20; *Phelan v. Hazard*, 5 Dill. [U. S. C. C.], 45; *Crawford v. Rohrer*, 59 Md., 599; *Young v. Erie Iron Co.*, 31 N. W. Rep. [Mich.], 814; *Coit v. North Carolina Gold Co.*, 14 Fed. Rep., 12.)

Where the capital subscribed is settled for by a transfer to the corporation of personal property belonging to the subscribers at an honest valuation fairly made and agreed upon between them, they cannot be held individually liable to creditors because the value of the property, estimated in the light of subsequent events, will not equal the amount at which it was received. (*Coit v. North Carolina Gold Co.*, 119 U. S., 343; *Peck v. Coalfield Coal Co.*, 11 Brad. [Ill.], 88; *Carr v. Le Fevre*, 27 Pa. St., 413; *Liebeke v. Knapp*, 79 Mo., 22.)

The books of the company were open to the creditor.

Gilkie & Anson Co. v. Dawson Town & Gas Co.

He could and should have examined them. The articles were of record providing that shares should be issued as fully paid up. These articles were posted in the office of the company. The books showed the true state of affairs—just how the property was bought and paid for. The creditor made no inquiry and is estopped by his negligence. (*Peck v. Coalfield Coal Co.*, 11 Brad. [Ill.], 88; *Buchanan v. Litchfield*, 102 U. S., 218.)

H. W. Pennock, C. A. Fowler, and Cavanagh, Thomas & McGilton, contra:

The capital stock of a corporation is a trust fund for the benefit of creditors, which may not be wasted or squandered by the corporation, and which may be sequestered in equity by creditors when the corporation has become insolvent. (*Fothergill's Case*, L. R., 8 Ch. App. [Eng.], 270; *Wood v. Dummer*, 3 Mason [U. S. C. C.], 308; *Sawyer v. Hoag*, 17 Wall. [U. S.], 610; *Osgood v. King*, 42 Ia., 478; *Upton v. Tribilcock*, 91 U. S., 47; *Sanger v. Upton*, 91 U. S., 60; *Crawford v. Rohrer*, 59 Md., 599; *Weatherbee v. Baker*, 35 N. J. Eq., 501; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala., 407.)

Subscriptions to capital stock may be regarded as debts due to the corporation always worth the par value of the stock. If the officers of the company have compromised with subscribers by any colorable transactions, so that the stock has not been fairly paid for, creditors may step in and enforce full payment therefor against all parties holding such stock with knowledge of the facts. (*Upton v. Tribilcock*, 91 U. S., 47; *Sanger v. Upton*, 91 U. S., 60; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 47 N. W. Rep. [Wis.], 726.)

A gross and obvious overvaluation is sufficient of itself to establish fraud as against creditors, unless the transaction can be fully and fairly explained upon a reasonable business basis. (*Douglas v. Ireland*, 73 N. Y., 100; *Na-*

tional Tube Works Co. v. Gilfillan, 124 N. Y., 302; *Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22; *Boulton Carbon Co. v. Mills*, 78 Ia., 460; *Bailey v. Pittsburgh & Connellsville Coal & Coke Co.*, 69 Pa. St., 334.)

The following cases were also referred to in the argument of counsel for appellee: *Thayer v. El Plomo Mining Co.*, 40 Ill. App., 345; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis., 427; *Carter v. Union Printing Co.*, 54 Ark., 576; *Terry v. Little*, 101 U. S., 216; *Farmers Bank v. Gallaher*, 43 Mo. App., 483; *Shickle v. Watts*, 94 Mo., 410; *Jackson v. Traer*, 64 Ia., 469; *Scoville v. Thayer*, 105 U. S., 143; *Union Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill., 537; *Alling v. Wensell*, 133 Ill., 264.

HARRISON, J.

December 26, 1891, this action was instituted by the creditors of the Dawson Town & Gas Company, a corporation formed under the laws of this state, against the corporation and the appellants, stockholders therein, to recover the amounts of judgments in favor of such creditors. The original party plaintiff was the Gilkie & Anson Company, the Crane Company becoming a party plaintiff by intervention. In the original petition the organization and existence as a corporation, of the defendant and also the plaintiff company, was averred, the object and purpose for which the defendant company was organized, its place of business, and the sale to it by plaintiff of a quantity of lumber, and that judgment was obtained for the debt thus created, execution issued and returned no property found. The insolvency of the defendant company was also alleged, and it was further stated: "That the authorized capital stock of said defendant corporation is \$300,000; that the said defendant refuses to allow the plaintiff to examine its books, and the plaintiff cannot learn and has no means of finding out the exact amount of stock actually issued, or the amount

Gilkie & Anson Co. v. Dawson Town & Gas Co.

of the unpaid portion of the subscriptions; but plaintiff alleges, upon information and belief, that defendants Norman A. Kuhn, Charles D. Woodworth, Arthur H. Cooley, and J. T. Hoile each own a large amount of said stock, the full par value of which has never been paid into said corporation, and that the amount remaining unpaid of the stock so owned and held by each of the said defendants is sufficient to pay the claim of the plaintiff in full. Plaintiff alleges further that the said corporation defendant was created in the month of September, 1889, and alleges, upon information and belief, that since its creation it has failed and neglected to give any annual notice, signed by its president and a majority of its board of directors, of the amount of all its existing debts in any newspaper printed in the county or any of the counties in which its business has been transacted, as is provided and required by the statutes of the state of Nebraska." These allegations, except in relation to the creation of the corporation, were denied in answer filed for the defendant company and the stockholders, and it was further averred that full payment of the par value of the stock owned by the stockholders, had been made. The Crane Company was allowed to intervene and become a party plaintiff. Its petition stated no new facts, but referred to, and made a part of it, the material allegations of plaintiff's amended petition. The plaintiff company was, on application, allowed to file an amended petition, in which it included other and further parties as stockholders and defendants, and after pleading substantially as in the original petition, the creation of the corporation, its purpose and powers, the indebtedness to plaintiff, the judgment, etc., the insolvency of the defendant company, and the failure to publish the annual notice required by law, further alleged: "That the authorized capital stock of said defendant corporation is \$300,000; that said stock was issued to each of the defendants Cooley and Hoile to the amount and of the par

value of \$120,000, and that as payment therefor defendants fraudulently turned into said corporation certain real estate at a false and fictitious valuation of \$205,000 and nothing else whatever, and that said real estate was worth no more than \$10,000, of all of which defendants Cooley, Kuhn, and Woodworth at the time had knowledge, and that there now remains unpaid on said stock the sum of \$230,000; that defendant Cooley is now the owner of said stock issued to him of the par value of \$53,500, and that there remains unpaid thereon, and said Cooley is individually liable to the creditors of said corporation by reason thereof, in the sum of \$51,270.80; that defendant Charles D. Woodworth is now the owner and holder of said stock issued to said Cooley, by assignment from him, of the par value of \$35,000, and that there remains unpaid thereon, and said Woodworth is individually liable to the creditors of said corporation by reason thereof, in the sum of \$33,451.66; that defendant Thomas H. Platter is now the holder and owner of said stock issued to said Cooley, by assignment from him, of the par value of \$4,000, and that there remains unpaid thereon, and said Platter is individually liable to the creditors of said corporation by reason thereof, in the sum of \$3,833.33; that defendant Norman A. Kuhn is now the owner and holder of said stock issued to defendant Hoile, by assignment from him, of the par value of \$35,000, and that there remains unpaid thereon, and said Kuhn is individually liable to the creditors of said corporation by reason thereof, in the sum of \$33,541.66; that defendant Alexander G. Charlton is now the owner and holder of said stock issued to said Hoile, by assignment from him, of the par value of \$12,500, and that there is unpaid thereon, and said defendant Charlton is individually liable to the creditors of said corporation by reason thereof, in the sum of \$11,979.16; that defendant J. R. Pearson is now the owner of said stock issued to said Hoile, by assignment from him, of the par

value of \$5,000, and that there remains unpaid thereon, and said Pearson is individually liable to the creditors of said corporation by reason thereof, in the sum of \$4,785."

The answer to the amended petition and petition of intervenor put in issue all the material facts therein stated, except that of the formation of the corporation, and further pleaded as follows: "Defendants aver as true that all stock as owned by them, or either of them, was in good faith taken and paid for at the time, and they, nor either of them, are now or at any time were indebted to said corporation for any amount of said stock or shares thereof. The defendants further answering show to the court that neither said amended petition nor the petition of intervention of the Crane Company states facts sufficient to constitute a cause of action against either of said defendants."

The plaintiff filed a reply, which was a denial general as to some and special as to others of the allegations of the answer. In the portion of the amended petition which we have copied herein the following words appear, "of all of which defendants Cooley, Kuhn, and Woodworth at the time had knowledge," which were not in the petition at the time of trial or introduction of testimony. There was a demurrer *ore tenus*, on the ground that the petition did not state a cause of action, and plaintiff and intervenor asked leave to amend, which, at the time of the rendition of decree, was granted, the amendment to be by interlineation, and pursuant to this leave the words above quoted were inserted in the petition. The petition stated two causes of action against the stockholders, one based upon their ownership of shares of stock for which full value had not been paid, and a second upon a failure to publish an annual notice of the indebtedness of the corporation. Counsel agree in the statement that the second of these was waived and that no evidence was introduced to prove or sustain it; that it was not of the issues litigated, was not urged, or was withdrawn from the issues in the trial court, and is not

urged here and need not be further noticed. The trial in the district court was of the issues joined upon the first cause of action, and in its decree the court set forth the findings, which, to the extent we need notice them particularly, were as follows: "The court finds from the evidence that the plaintiff, a corporation, on July 5, 1890, duly recovered judgment against the Dawson Town & Gas Company, a corporation, in the district court of Douglas county, Nebraska, in the sum of \$763.38, and costs taxed at \$15.68; and on September 3, 1890, the intervenor, the Crane Company, a corporation, duly recovered judgment against said defendant corporation in the county court of Douglas county, Nebraska, in the sum of \$904.50, and costs taxed at \$3.15; that the defendant the Dawson Town & Gas Company is insolvent and without property where-with an execution may be in any part satisfied; that the authorized stock of the defendant corporation was \$300,000, to be issued in shares of \$100 each; that stock of the defendant corporation was issued to each of two of its incorporators, A. H. Cooley and J. T. Hoile, defendants, of the par value, and to the amount of \$120,000; that as full payment for said stock said incorporators turned into said company certain real estate, subject to mortgages aggregating \$25,000, the equity in which was at the time of the value of \$20,000, and that said real estate was accepted by the directors of the defendant corporation in full payment of said stock, and that said stock was issued as fully paid and non-assessable; that of said stock so issued defendant Arthur H. Cooley is now the owner of 575 shares; defendant Norman A. Kuhn (as to the complaining creditors), of 350 shares; defendant Charles C. Woodworth, of 350 shares; and defendant Alexander G. Charlton, of 125 shares. The court further finds that the act of the directors in accepting said real estate in full payment of said stock was a fraud in law as to the creditors of said corporation, and that said estate was a payment on said stock

only to the amount of the actual value of the interest of said incorporators therein, and that there remains unpaid on said \$240,000 the sum of \$220,000; that defendants Arthur H. Cooley, Norman A. Kuhn, and Charles D. Woodworth had knowledge at the time they acquired their said stock of the manner in which the pretended payment was not accepted by the defendant company in good faith, and that the defendants owning shares of said stock are each liable for the unpaid portion thereof in such ratio to the whole amount unpaid as the number of shares owned by each bears to the whole number of said shares; *i. e.*, Arthur H. Cooley, in the sum of \$52,708.33; Norman A. Kuhn, \$32,083.33; Charles D. Woodworth, \$32,083.33; and Alexander G. Charlton, \$11,458.33."

The liability upon which this alleged cause of action was predicated, and which was and is relied upon, is provided for in the following section of the constitution of our state, being section 4 of article 11, referring to "Miscellaneous Corporations": "In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." The plaintiffs claimed that the transactions which occurred at the inception of the defendant corporation, the issuance of stock and acceptance of the equity in certain land in payment for the stock, were of such a character as to constitute a fraud, and the transfer of the lands will only be considered a payment for the stock to the amount of their true values, and the stockholders be liable individually to creditors for any balance required to make the par or face value of the stock. The defendant company was organized for the following purposes, as shown by its articles of incorporation: "The business to be transacted by said corporation shall be the

buying of lands in the states of Iowa and Nebraska, platting into lots and selling the same, lending money on real estate and other securities, building houses, leasing and selling the same, erecting and furnishing buildings, machinery and all necessary appliances for the manufacture of brick, terra-cotta, tiling, and other products from clay, and the conducting of a general business of the manufacture and sale of brick, terra-cotta, tiling, and other products as aforesaid; acquiring by purchase and lease of lands upon which to sink wells, producing natural gas and oil, and acquiring by purchase, lease, or the exercise of the right of eminent domain, of lands for right of way for the laying of gas mains, laterals, and house connections; the erection of buildings and machinery for the manufacture, storage, and transmission both of artificial and natural gas and oils; the purchase, sale, and exchange of pipes, mains, fixtures, machinery, and material for the business of furnishing natural and artificial gas to municipalities and individuals; the mortgaging of the property of said association, procuring of loans; and, generally, the transaction of all business incident to the development and storage of oil and natural gas, and the manufacture of artificial gas and storage, transmission, sale, and delivery of such gases and oil to municipalities and individuals."

It appears from the testimony that Cooley, Hoile, Kuhn, and Woodworth organized the defendant company, signed the articles, and were directors and well acquainted with the details of its formation, the purchase of the lands and issuance of \$240,000 in stock in payment for them. There were two tracts of land, one of 300 acres, known as the "Tolle Farm," and one of 320, known as the "York Farm." Coal had been discovered on the "Tolle Farm" and had been developed, or two shafts sunk on one forty-acre piece. The rights to all coal or all mineral existing under the surface of this forty acres had been conveyed to a Mr. Whiteman. Coal had been prospected for on the

other portions of this farm, but not developed or mined. Cooley and Hoile had contracted for the purchase of the "Tolle Farm" at some date prior to the formation of the defendant corporation in such a manner that they had what they termed an option on it, and after they had made arrangements for the creation of the corporation and its probable purchase of the land, they completed the deal and became the owners of the farm, paying therefor \$21,000. The conveyance to them did not include the coal under the forty acres in which shafts had been sunk. The other 320 acres, or the "York Farm," belonged at the time of its purchase by Cooley and Hoile to the Perry Natural Gas Company, in which Cooley and Hoile had each a one-sixth interest. H. B. Stout, T. R. Pearson, and C. H. Wigton also each owned a one-sixth interest in the Perry Gas Company, and agreed to sell their interests to Cooley and Hoile for \$5,000 each of stock of the Dawson Town & Gas Company, and the "York Farm" of 320 acres was conveyed to Cooley and Hoile. There were on this farm some gas wells which were in operation prior to and about the time of the sale to Cooley and Hoile. They then gave two mortgages on the 620 acres of land, one of \$20,000 and one of \$5,000, and conveyed it to the defendant corporation, it assuming and agreeing to pay the incumbrances, and Cooley and Hoile receiving as a further consideration for the transfer of the land to the company \$240,000 in stock, or \$120,000 each. Kuhn purchased fifty shares, for which he paid cash, as did also C. D. Woodworth, these being the only shares of stock sold for which money was paid or received. Cooley transferred \$35,000 worth of his \$120,000 of stock to Woodworth and a like amount to Bartlett. Hoile transferred \$35,000 in stock to Kuhn, and on the date when the one hundred shares which Kuhn and Woodworth had bought were issued to them respectively there was issued to Bartlett, Kuhn, and Woodworth, respectively, \$35,000 each of the

stock which had belonged a part to Cooley and part to Hoile. Neither Woodworth nor Kuhn nor Bartlett paid any cash or gave any definitive or fixed consideration for this \$35,000 worth of stock. Cooley, when testifying, stated in relation to the issue to Woodworth, in answer to a question by the court, that a part of the consideration for the issue of the \$35,000 in stock to him was that he, Woodworth, would subscribe for fifty shares of stock. Subsequently, during his testimony, he stated this was not the fact and that he did not think he had so testified. All parties agreed that these shares were issued to Bartlett, Woodworth, and Kuhn for assisting in floating the institution, to aid in selling stock, in inducing parties to go to Dawson and invest in lots or property or build factories and to contribute money when needed in the business of the corporation. Kuhn stated that he advanced to the company \$7,000 and Woodworth claims that he contributed \$5,400 to pay running expenses of the company, not as payment for or on stock, but advances which they expected to be repaid to them. The defendant corporation was organized in September, 1889. It continued its various operations for several months afterwards, when it ceased active business. Some of the parties testify for want of funds. The \$20,000 mortgage was foreclosed and on February 28, 1891, sale of the property was made by the sheriff, the sum realized being \$16,000. The foregoing are some of the facts and circumstances attendant upon and entering into the formation of the defendant corporation. There was considerable testimony on behalf of defendants which it was claimed tended to show the good faith of the members of the company in the transactions which occurred at or near the time of its formation, the purchase of the land and issuance of the stock in payment therefor; and by plaintiffs an attempt to show the want of good faith in the actions to which we have just alluded. The value of the land at the time it was conveyed to the corporation was also made

the subject of testimony on behalf of either party to the case, but we do not deem it necessary to quote from or summarize it.

It is urged that the findings of the trial court are not sustained by the evidence, and especially as to the points in regard to the alleged overvaluation of the property conveyed to the corporation in payment for stock of the face value of \$240,000, the knowledge which it was claimed the parties who were actors in the formation of the corporation had of the excessive valuation of the land at the time it was conveyed to the company and the stock issued, and their participation or acquiescence in the transaction. We have carefully read and considered all the testimony, and, without entering upon a lengthy discussion of or commenting upon it, will say that we are satisfied that it is sufficient to support the findings of the trial judge.

It is further contended by the able counsel for defendants that it is not proved that in accepting the land at the valuation they did in payment for the stock they were acting otherwise than in good faith with each other and with the public, and although it may be claimed, and probably truthfully, that subsequent developments disclosed that there was an error of judgment, yet fraud in law or in fact cannot be imputed, and that in a case similar to the one at bar, in order to establish a basis for a recovery, the law requires that more than proof of an overvaluation of property conveyed or services rendered in payment for stock of corporations be given; that it must be shown that the overvaluation was intentional and therefore fraudulent; that what the parties have constituted a payment will be treated as a payment until impeached for fraud, even where the rights of creditors are involved; that before parties gave the corporation credit they should have examined its books, the condition of its affairs, and how the stock was paid for, and to what extent, and not having done so they were at fault, and a number of au-

thorities are cited to sustain the propositions announced in this contention. In some jurisdictions it is provided by law that stock purchased of a corporation, such as the one from the creation of which this controversy arose, must be paid for in money. In others that it may be paid for in money or in property or labor which the corporation is entitled to acquire, or can use in the furtherance or forwarding the purposes for which it was created. In some the provisions further require that the property or labor be the "money's worth" at a fair and reasonable value, and others that property or labor be received at its worth in money, and in good faith. In California there is a statute under which mining stock may be purchased at less than its par value without making the stockholder liable for such par value, and custom seems to have sanctioned a similar relaxation of the rule that par value must be paid. (*In re South Mountain Consolidated Mining Co.*, 7 Sawy. [U. S.], 32; *Ross v. Silver & Copper Island Mining Co.*, 26 Am. Law. Reg. [Minn.], 158.) But, as is said in a note to the last mentioned case, on page 164, "Concluding with reference to mines, it may be laid down as a general proposition, that, in the absence of a custom or statute, shareholders in a mining corporation are liable for the par value of shares subscribed by them, and if a custom to the contrary is relied upon to exonerate a shareholder from liability, such custom must be proved; it will not be judicially noticed." (See cases cited.) In this state there were no specific requirements or restrictions in relation to the manner of payment for the stock purchased, and no doubt the land, being such as it was within the province of the company to hold and appropriate for use in its business, could be received in payment for stock. There was no statutory requirement that payment should be in money or the money's worth; but without such an enactment, we think there is a rule of honesty and fair dealing, which should and will be recognized by the courts, which required it. It is the settled doc-

trine in this country that "the capital stock of a corporation is a trust fund, to be preserved for the benefit of corporate creditors," and this includes the unpaid subscriptions to such stock. It follows that the funds cannot be wasted or dissipated and that an acceptance of payment for stock subscriptions which is merely simulated, or any other arrangement or scheme by which something is allowed as a payment of subscriptions for stock, which lacks the element of good faith, will not be sufficient to and cannot impair or work the defeat of the trust. (*Scovill v. Thayer*, 105 U. S., 143; *Osgood v. King*, 42 Ia., 478; *Wetherbee v. Baker*, 35 N. J. Eq., 501.) It must be true that where a number of persons have organized themselves as a body corporate and enter the business arena as such and invite and entertain dealings on the faith and credit of a fund which, increased by gains or decreased by losses, will alone be available for the liquidation or payment of debts, that they will be held to fairness and good faith in fulfilling the promise they made to contribute to the fund which they hold out to the business world as the basis for credit. It is upon the faith of the amount of the capital stock, either fully paid in and existing in the form of assets of the corporation, or to be paid in, that the creditor has dealt with and allowed the corporation to incur the liability, or has extended to it the credit, and it seems but just and right to require that payment for stock in other than money be required to be made in the money's worth in good faith and honesty of purpose, and when the circumstances and facts of a sale and purchase of stock disclose that there has been knowingly less than these, that it shall not be upheld as against creditors, but the parties be compelled to right what is wrong, to pay and make good that which, through any device or scheme, has been withheld. Upon the question of the liability of stockholders to creditors on stock which had been issued for property received at an overvaluation the decisions of the courts are apparently irreconcilable. (For a review of

them see *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 9 So. Rep. [Ala.], 129.) We are satisfied that the weight of authority in this country is in favor of the doctrine that where any agreement is made whereby stock is knowingly and advisedly issued as paid in full, though but partially paid for, it may be set aside by creditors and the enforcement of payment in full of the subscription for the stock obtained for the satisfaction of the debts of the corporation. This is a result of the doctrine that the subscriptions for stock of a corporation are a trust fund for the payment of its debts, which is an American doctrine, and which does not prevail in England. (Taylor, *Private Corporations*, sec. 658, note 1.)

It may be conceded that when the power exists to accept property in payment for stock the corporation and subscriber may agree upon the value of property to be received in payment for stock in such manner as to be binding upon creditors, if there is no considerable advised and deliberate excessive overvaluations of the property, and that the stockholders will not be liable where the valuation was in good faith, although the property may subsequently prove to be of a less value than that placed upon it, or if there was nothing more than an honest mistake of judgment, but "a gross and obvious overvaluation of property, would be strong evidence of fraud," in an action by a creditor to enforce a personal liability. (*Coit v. Gold Amalgamating Co.*, 119 U. S., 343, 7 Sup. Ct. Rep., 231.) Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation, if there has been a fraudulent overvaluation of the property,—an overvaluation knowingly and advisedly made. The property proffered and received as payment must be of such a value as to make it of the money's worth stated in the subscription, at a valuation made in good faith in an exercise of judgment honestly and fairly directed. (*Williams v. Evans*,

Gilkie & Anson Co. v. Dawson Town & Gas Co.

87 Ala., 725, 6 So. Rep., 702.) It will be sufficient to impeach the transaction to prove that the stock issued and delivered to the subscriber exceeded in amount the value of the property conveyed to the corporation in payment for the stock; that the parties to the transaction of sale and purchase of the stock knowingly and advisedly placed such overvaluation upon it that there was paid in stock for it an amount the par value of which was known to be more than the actual value of the property. (*National Tube Works Co. v. Gilfillan*, 124 N. Y., 302; *Wetherbee v. Baker*, 35 N. J. Eq., 501; *Osgood v. King*, 42 Ia., 478; *Boulton Carbon Co. v. Mills*, 78 Ia., 460; *Jackson v. Traer*, 64 Ia., 469; *Bailey v. Pittsburg & Connellsville Gas, Coal & Coke Co.*, 69 Pa. St., 334; *Thayer v. El Plomo Mining Co.*, 40 Ill. App., 345; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala., 407; *Leucke v. Tredway*, 45 Mo. App., 507; *Crawford v. Rohrer*, 59 Md., 599; *Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22; *Scovill v. Thayer*, 105 U. S., 143.) The trial court established by its findings that the facts of the present case brought it within the foregoing rules, and there was sufficient testimony to support the findings.

It is urged that these parties—creditors,—before they gave credit to the corporation, should have examined the books of the company and ascertained whether appellants had paid in full for the stock or in what manner the payment had been made, and, having failed to do so, cannot now complain or be heard, and cases are cited in support of this proposition. In *Cook, Stock, Stockholders & Corporation Law*, section 199, it is said: "The public, in dealing with a corporation, has the right to assume that its actual capital in money or money's worth is equal to the capital stock which it purports to have, unless it has been impaired by business losses." We think the true rule to be that "Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corpora-

tion and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of the acts or resolutions entered upon its minutes. As to third persons, the books of a corporation are private books, and such persons are not chargeable with knowledge of matters therein recorded, any more than a third person would be chargeable with knowledge of entries made against him in the books of a private person. (1 Greenleaf, Evidence, sec. 493; 1 Wharton, Evidence, sec. 662; *Haynes v. Brown*, 36 N. H., 545; *Marriage v. Lawrence*, 3 B. & Ald., 142;" *Wetherbee v. Baker*, *supra*.)

It is claimed that upon the abandonment of the alleged statutory default in respect to publication of notice the petition did not state a cause of action; that there was no sufficient allegation of fraud. We think the petition, as amended by leave of the court, sufficiently stated and charged fraud (*Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22); and the amendment and its allowance were entirely proper under the provisions of the Code.

Complaint is also made of the ruling of the trial court in sustaining an objection to an interrogatory propounded to one of appellants during his examination as a witness. No statement or offer of proof was made, and we cannot hold that the objection was wrongfully sustained. (*McMillan v. Malloy*, 10 Neb., 235; *Stanton County v. Canfield*, 10 Neb., 388; *Sieber v. Weiden*, 17 Neb., 584.) The judgment of the district court is

AFFIRMED.

RAGAN, C., dissenting.

This is a suit by some creditors of an insolvent private corporation against its stockholders. The creditors seek to recover their debts of the stockholders on the ground that the latter are indebted to the corporation on their stock subscription. This corporation was authorized by its charter

Gilkie & Anson Co. v. Dawson Town & Gas Co.

to engage in the business of buying and selling lands in the states of Nebraska and Iowa; to plat and lay out real estate into lots, blocks, streets, and alleys for the purposes of cities, villages, and towns; to manufacture brick, terracotta, tiling, and other articles that could be made from fire clay; to pipe gas and to mine coal, etc. The authorized capital stock of the corporation was \$300,000, of which the appellants Hoile and Cooley took \$240,000, and paid for the same by deeding to the corporation 620 acres of land. The petition of the appellees filed in the court below charged that the appellants in payment for the stock subscribed by them fraudulently turned into said corporation certain real estate at a false and fictitious valuation, to their knowledge. The district court found that the act of the directors in accepting said real estate in full payment of said stock was a fraud in law as to the creditors of said corporation. The court also found that the value of the real estate transferred to the corporation by Cooley and Hoile was \$20,000.

The decision of this court treats this conclusion of the district court as a finding that the transaction by which Cooley and Hoile transferred their real estate to the corporation in payment of their stock subscription was a fraud in fact. I do not think the district court found or meant to find that the transaction was a fraud in fact, but, assuming that it did, let us inquire on what evidence this finding was based. Briefly it is that Cooley and Hoile owned 620 acres of land and that they conveyed this land to the corporation in payment and satisfaction of their contract of subscription with it to take \$240,000 of its capital stock; that this land at that time was worth only \$20,000, and that the debts of the appellees were contracted long after this transaction. If this evidence stood alone—stood unexplained—it might support the finding, but it does not stand alone and unexplained. I quote the evidence given by appellee's own witness.

Q. Do you know whether at that time there had been any prospecting for gas; that is, at the time the conveyance of the land was made to the corporation?

A. Yes, sir; there had been considerable prospecting for gas and they might have incidentally prospected for coal at that time.

Q. Had gas been found?

A. Yes, sir.

Q. How long had gas been found on this farm at this time? In what quantities; state what you can as to the fact.

A. My recollection as to the time of first striking gas there is that it was perhaps fifteen to eighteen months after gas was first struck there on this farm until the transfer to the Dawson Town & Gas Company. As to the quantity I would not feel qualified to state more than just what I could naturally see, not being a gas expert.

Q. Do you know how many of the gas wells were sunk prior to this time?

A. As to the number I could not definitely say, more than I know that there was one we called the "original well," and I think that there were one or two others, but I am not sure whether they were sunk. If they were it was just previous to the time of the Dawson Town & Gas Company buying this.

Q. What can you say as to the flow of the gas from the well or the continuity of it and the amount of it?

A. * * * I have been there a good many times and lived right there, and of course everybody had a natural curiosity to see them, and I have been there a time or two when there were excursions. I know when they were turned on and lighted up flames would flash up there twenty-five or thirty feet and higher.

Q. Was any use or attempted use ever made of this gas after this?

A. After they acquired it?

Q. After they acquired it.

A. Yes, sir.

Q. You may state what use it was put to.

A. These wells are situate about a mile from the town of Dawson * * * and probably a mile and a quarter from what is known as the "brick plant," and the company, after acquiring these wells, laid pipes from the wells to the brick plant * * * up to the edge of the town or into where the town was planned, * * * and this gas was piped into our store, and we burned it one winter; I do not know but two winters.

Q. Did they ever use it at the brick yard?

A. They used it there and they piped it into the furnace under the engine, and they also piped it into the brick-kilns.

Q. When were the developments of coal made there?

A. The first developments?

Q. Yes, sir.

A. The fall of 1886 and the winter of 1886 and 1887.

Q. Do you know anything about in what quantities coal was taken from this land?

A. At what time?

Q. Well, after it was developed, from 1887 on.

A. Up to what time?

Q. Well, any time.

A. Well, they sunk a shaft in the fall of 1886 and they took out coal that winter and they run the most of that winter there; they run from eight to fifteen miners and they would take out, oh, probably twenty tons a day. * * *

Q. How long did this continue?

A. Well, this continued until the Dawson Coal Company bought. * * *

Q. At the time this property was transferred to the Dawson Town & Gas Company was any of this land platted into a town site?

A. There had been a survey made. * * *

Q. Well, take it in the fall of 1889. How much of a town was there then?

A. There were about three hundred inhabitants.

Q. Do you know how many of these gas wells there were there?

A. At the present time?

Q. Well.

A. Well, they were all there that was. They were all either sunk in 1889 or previous to that. I think there are five wells, four of these that they have houses over and use, and the fifth one is what we call a gurgler and that is filled with water and they have trouble with it, but there is more or less gas in it. * * * I think there is only four that is piped that I spoke of.

The lands conveyed to the corporation by Cooley and Hoile are contiguous, all situate in the state of Iowa, and one tract of about 300 acres had been purchased by Cooley from the Tolle estate. Tolle in his lifetime had leased to certain parties the right to mine coal on forty acres of the lands conveyed to Cooley, the lessees paying Tolle a royalty of ten cents per ton. Now let us hear once more the appellee's witness:

Q. Now, there has been some other leases spoken of. Under what particular portion of the lands were those leases?

A. Those were under the lands acquired by Mr. Cooley.

Q. In the transfer to Cooley, who acquired the right to those leases, did he?

A. Yes. * * *

Q. So that whatever would accrue on those leases would belong to Mr. Cooley instead of the Tolle heirs?

A. Yes, on those leases, that is right. * * * Mr. Tolle died in February, 1888. In the spring of 1887 * * * Mr. Tolle requested me to make a measurement, to take the measurement on coal and estimate how much royalty he would receive at ten cents per ton on the coal.

I made the measurements in the first bank or clay shaft that was sunk. * * * I made those measurements, and on the figures that Mr. Tolle gave me three cubic feet per ton of solid coal, and if the veins were the same it would net him about \$400 per acre if the veins were the same on the other forties as they were on this forty where I made the measurements. * * *

Q. What was the thickness of the vein where you made the measurement?

A. The one vein was three feet ten inches, I believe. These veins vary, however, in different parts of the mine, and they would run from two feet and one-half to four feet and one-half.

Q. Is this village of Dawson situate on a part of this land?

A. Yes; * * * about a mile and a quarter from the gas well. * * *

Q. It is the coal land?

A. Yes, sir.

Q. Has coal been mined there continuously from that time on?

A. No, sir; coal has not been mined continuously, that is, if you mean by that taken out all the time, because there was a time for nearly a year there was no coal taken out.

Q. The mines were not worked?

A. No, sir.

Q. When was that?

A. That was previous to this last fall. * * *

Q. When was it first discovered on the York farm; part of the land conveyed by Cooley?

A. It must have been in 1888.

Q. Prior to the development and discovery of gas and the development of coal there, how much of a town was Dawson?

A. Well, in January, 1887, there wasn't only four or five houses in Dawson. * * *

Q. How many houses were there in January, 1888?

A. Well, I should say, just estimating from my recollection, about fifty.

Q. After the purchase of this land * * * was there any town platted known as the town of Dawson, by the Dawson Town & Gas Company?

A. Yes, sir.

Q. How many acres?

A. One hundred and sixty.

Q. Did you sell any of these lots?

A. A few; yes.

Q. At what price?

A. They varied in price.

Q. What did the business lots sell for?

A. From \$125 to \$266.

Q. How many miners worked there?

A. All the way from one hundred and fifty down at different times.

Q. How large a brick plant was started there after the gas was used?

A. The main part of the building was about sixty by sixty-five or seventy-five and the drying room was about fifty by probably one hundred and fifty.

Q. Do you know anything about the fire clay there under that ground?

A. I know there is fire clay there.

Q. To what extent?

A. I do not know.

Q. Did you ever make an examination?

A. No, sir; no personal examination. I have been in the mines where fire clay was and asked miners about it.

Q. Out of what was brick manufactured?

A. Brick was manufactured out of shale and fire clay.

Q. Where was that latter to be obtained?

A. Out of the coal mines, and I think some little surface clay was used, but not very much.

Q. And that was all understood and known to exist there at the time of this sale by the Tolle heirs to Cooley?

A. Yes, sir.

The evidence quoted above stands absolutely uncontradicted, and is the evidence introduced by the appellee itself. This evidence does not show that the appellants intentionally overvalued the lands which they conveyed to the corporation in payment of their stock subscription. Granted that subsequent events have proved that the appellants erred in their judgment as to the valuation put on their lands, will the evidence that the appellants erred in their judgment support a finding of fraud? I think that this evidence shows that at the time these lands were deeded to the corporation for its stock it was honestly believed and reasonably believed by the appellants that they were coal, gas, and fire clay lands. Shafts had been sunk, coal had been mined on part of the lands, on other parts of the lands wells had been drilled and inflammable gas had been found, and the existence of these facts led to the organization of this corporation. The evidence further shows what appellants did after they became stockholders of this corporation, and this is important here in determining with what intention they made the transfer and took the stock; and the evidence shows that these appellants expended thousands of dollars of their money in efforts to develop these lands believed to be coal and gas lands, and had these proved to be what they appeared, if their development had disclosed valuable coal and oil deposits, who can estimate their value? Yet the transaction by which the corporation became possessed of these lands and the intent with which they were conveyed by the appellants would have been the same transaction and the same intent. A transaction cannot be said to be in good faith simply because successful, nor can a fraudulent intent be inferred because the transaction proved unsuccessful. Fraud will never be imputed when the circumstances and facts upon

which it is predicated may consist with honesty and purity of purpose. (*Clemens v. Brillhart*, 17 Neb., 335.) Is it not clear that this evidence is entirely consistent with the theory of honesty of purpose on the part of these appellants? Overvaluation of property will not of itself support a finding that the transaction was fraudulent, but the proof must show that such overvaluation was made intentionally and with a sinister motive. (*Schenck v. Andrews*, 57 N. Y., 133; *Boynton v. Andrews*, 63 N. Y., 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y., 87.) An overvaluation of property affords no ground of complaint to creditors of the corporation, provided such payment is made and accepted in good faith. (*Young v. Erie Iron Co.*, 65 Mich., 111.) While the contract stands unimpeached as fraudulent, the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be a payment (*Phelan v. Hazard*, 5 Dill. [U. S.], 45); and the fraud must be an actual fraud in the sense of a dishonest purpose, not a theoretical fraud (*Bank of Fort Madison v. Alden*, 129 U. S., 372). If these appellants have not paid in full their stock subscription, they are indebted to the corporation; but the appellee has no greater rights against the appellants than the corporation has; and how can it be said under this evidence that this corporation could impeach this transaction between it and Cooley and Hoile for fraud? If the corporation cannot impeach the contract, the creditors cannot do it. There is no evidence in this record that Cooley and Hoile, or either of them, in anything that they did in and by which they became stockholders of this corporation, were actuated by other than the purest motives. In *Coit v. Gold Amalgamating Co.*, 119 U. S., 344, the capital stock of the corporation was fixed at \$100,000. Previous to the organization of the corporation the incorporators had been engaged in mining operations, and when the corporation was organized they turned in their mining property to

the corporation in payment of the full amount of the capital stock taken by them. The corporation became insolvent, and a creditor having obtained a judgment against it had execution issued, and it being returned no property found, he sued the stockholders to recover his debt, the ground of his action being that the property turned in by the stockholders to the corporation in payment of the stock subscribed was turned in at a fictitious valuation. The evidence disclosed that the property, when turned into the corporation, was of small value as compared to the amount of stock given for it, but that the stockholders, the nature of the property considered, had good reason to believe that it was of as great value as that put upon it by them and that the entire transaction was in good faith and not entered into for the purpose of putting the stock on the market, selling it, and keeping the proceeds and thus victimizing the public, but with a view on the part of the stockholders to develop the mines supposed to be on the property. The argument was that the transaction should be held fraudulent solely on the overvaluation of the property transferred to the corporation. The court said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where * * * the shareholders honestly and in good faith put in property instead of money in payment of their subscription, third parties have no ground of complaint. * * * Where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account." To the same effect see *Peck v. Coalfield Coal Co.*, 11 Ill. App., 88; *Coalfield Coal Co. v. Peck*, 98 Ill., 139. They believed, and the evidence shows that they believed, and they had good reason to believe, and the evidence shows that they had such reason to

believe, that these properties were worth at the time they transferred them to this corporation four or five hundred dollars an acre. They proved their faith by what they did. They paid thousands of dollars for these lands and they spent thousands of dollars in their efforts to develop them after they became the property of the corporation. The evidence does not show, it does not tend to show, that they organized this corporation for the purpose of victimizing the public; they did not organize it for the purpose of putting this stock upon the market and selling it and pocketing the proceeds. The finding of a district court is entitled to serious consideration and great weight, but if the learned district court found in this action that the act of the appellants in paying for their stock in the land conveyed to the corporation was fraudulent, the finding has no evidence upon which to rest. The effect of this finding is to stamp the intention with which an act is done fraudulent or not as it may finally turn out that the party in doing the act did or did not err in his judgment; and where the act is a part of a commercial venture, whether or not it is fraudulent is made to depend upon the success or failure of such venture. To this I cannot agree.

C. W. TRACEY V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1895. No. 6928.

1. **Criminal Law: MOTION FOR NEW TRIAL: MISCONDUCT OF JURY: EVIDENCE: REVIEW.** A defendant convicted of a felony, in support of his motion for a new trial, filed an affidavit alleging misconduct of the jury while deliberating. The statements of the affidavit were not corroborated, and it did not appear by what means the affiant obtained possession of the facts alleged to constitute the misconduct. The averments of the affidavit were not denied by the state. *Held*, (1) That the trial court was not

Tracey v. State.

obliged to take the statements of the affidavit as true; (2) that whether there had been misconduct of the jury was a question of fact for the district judge; (3) that in trying such issue the district judge had a right to weigh and consider, as against the statements in the impeaching affidavit, the presumption of law that the jurors had obeyed their oaths.

2. —: SENTENCE: QUESTIONING CONVICT. A district court, when called upon to pronounce judgment against a person convicted of a felony, is not limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him.
3. —: —: —. The district court in such a case has no authority to coerce an answer from a prisoner to any question whatever; but what inquiries the court shall make of such a prisoner, aside from the inquiries provided by statute, or whether any, is a matter resting entirely in its discretion.
4. Robbery: SENTENCE. The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment, within the limits of the statute, according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition, and the previous good character of the person convicted.
5. —: EVIDENCE. In a prosecution for robbery everything said and done by the prosecuting witness and the prisoner at the time of the felonious assault is competent evidence as being a part of that transaction.
6. —: INFORMATION: ALLEGATION AS TO CHARACTER OF MONEY. An information for robbery charged the prisoner with having robbed the prosecuting witness of \$14.50, "good and lawful money of the United States." *Held*, That the averment as to the character of the money was surplusage and need not be proved in order to sustain the conviction. (Criminal Code, sec. 420.)
7. Modification of Instructions. It is error for the district court to modify an instruction requested, by interlineation or erasure, and thus give such an instruction. (Compiled Statutes, ch. 19, sec. 53.)
8. Review. To secure the reversal of a judgment in an error proceeding to this court it is not enough to establish that the dis-

Tracey v. State.

trict court erred, but it must appear from the record that such error may have caused or contributed to the judgment under review and thus have prejudiced the complaining party.

ERROR to the district court for Lancaster county. Tried below before STRODE, J.

The facts are stated by the commissioner.

Walter A. Leese, for plaintiff in error:

A juror during deliberation upon the verdict made statements of facts in the case within his own personal knowledge. These statements were prejudicial to plaintiff in error and are grounds of reversal. (*Richards v. State*, 36 Neb., 18; *Wood River Bank v. Dodge*, 36 Neb., 708; *Anshicks v. State*, 6 Tex. App., 524; *Wharton v. State*, 45 Tex., 2; *Winslow v. Morrill*, 68 Me., 362; *Morton v. State*, 1 B. J. Lea [Tenn.], 498; *Boody v. State*, 4 Yerg. [Tenn.], 111; *Wade v. Ordway*, 57 Tenn., 229.)

The information alleges the robbery of fourteen dollars and fifty cents "in good and lawful money of the United States." Torn bills are not admissible to prove this allegation. (*Taylor v. State*, 29 N. E. Rep. [Ind.], 415; *Coffelt v. State*, 11 S. W. Rep. [Tex.], 639.)

The court erred in giving an instruction modified by interlineations. (Consolidated Statutes, sec. 1072.)

The court, in defining the crime of robbery, should have instructed on the crime of larceny, and larceny from the person. Where the court undertakes to define the elements of the crime it should define the lesser offenses included in the crime. (*Stevens v. State*, 19 Neb., 647; *Brown v. State*, 33 Neb., 354, 34 Neb., 448.)

C. W. Starling, also for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state.

RAGAN, C.

In the district court of Lancaster county C. W. Tracey was convicted of the crime of robbery and sentenced to the state penitentiary for seven years. He brings the judgment of the district court here for review and assigns as a reason for its reversal the following alleged errors: .

1. In support of his motion for a new trial Tracey filed in the district court an affidavit alleging that while the jury that convicted him was deliberating upon its verdict one of the jurors stated to his fellows that he was personally acquainted with a witness who had testified on the trial in behalf of the prisoner; that this witness was an unchaste woman, unworthy of belief, and that her testimony could not be relied upon; that another juror, while the jury was deliberating upon its verdict, stated to his fellows that he also was personally acquainted with said witness; that he knew her when she was a respectable woman; that he now knew her to be unchaste and unworthy of belief. The witness referred to testified on the trial in behalf of the prisoner and her evidence tended to establish an *alibi* in his favor. The reputation of this witness for veracity was not assailed on the trial. The statements made by the prisoner in his affidavit were not denied by the state at the hearing of the motion for a new trial, and it is to be observed that the prisoner does not state in his affidavit by what means he became possessed of what he alleges occurred in the jury room while the jury was deliberating. The argument is now made that since the testimony of the said witness was material, and if believed by the jury, established the innocence of the prisoner of the crime for which he was tried, and since the reputation of said witness for veracity was not assailed on the trial and the truth of the statements made by the prisoner in his affidavit was not denied by the state, that the district court was compelled to take the statements made in such affida-

vit as true, and that such statements show such misconduct on the part of the jury as to vitiate the verdict, and that the district court erred in not so holding; but we are of opinion that the trial judge was not compelled to take the statements made in the prisoner's affidavit as true. The district court, in trying the issues presented by the motion for a new trial, had the right, if it was not obliged, to indulge the presumption that the jurors had been mindful of the oaths which they took, and had found the verdict which they had solely upon the evidence introduced on the trial of the case. What were the issues presented? Whether the juror had been guilty of such misconduct as to vitiate the verdict. This was a question of fact to be determined by the trial court from the competent evidence before it bearing on the subject. The law supplied, by presumption, the evidence on the one hand that the jurors had obeyed their oaths. This evidence, this presumption, the district court weighed and considered; on the other hand it weighed and considered the statements made by the prisoner in his affidavit impeaching the verdict; and after weighing this presumption in support of the verdict and the affidavit of the prisoner against the verdict it reached the conclusion that the evidence did not support the assault made upon the verdict. We think that the evidence before the district judge justified the conclusion reached. We agree with the supreme court of South Carolina in *State v. Duestoe*, 1 Bay, 377, where it is said there is no rule of law which requires a trial judge to believe affidavits filed impeaching a verdict, even though such affidavits are not contradicted, since the jurors themselves are under oath to well and truly try, etc. The evidence for and against impeaching a verdict in such a case is the oaths of the jurors upon the one side, coupled with the presumption that they have obeyed such oaths, and the statements in the impeaching affidavits upon the other side.

2. When Tracey was arraigned for sentence in the dis-

trict court he was asked by the trial judge how many terms he had already served in the state penitentiary, and he answered "two." The record does not disclose that Tracey made any objection whatever to answering this question. So far as the record shows, the question was promptly and voluntarily answered. It is now insisted that the district court had no authority of law for making such inquiry; that the only object which the trial judge could have had in making the inquiry was to increase the punishment of the prisoner for the crime of which he stood convicted if it should turn out that the prisoner had previously been in the penitentiary. Section 495 of the Criminal Code provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him." We do not think that a district court, when called upon to pronounce judgment against a person convicted of a felony, is limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him. This provision is for the benefit of the prisoner, is mandatory in his behalf, and if not complied with is ground for setting aside the judgment pronounced. (*Dodge v. People*, 4 Neb., 222.) We do not decide that the court has any authority to coerce an answer from a prisoner arraigned for a sentence to any question whatever, but what inquiries a court may make of such a prisoner, aside from the inquiry provided by the statute, or whether any, is a matter resting entirely in the discretion of the court. We do not know what the object of the trial judge was in inquiring of the plaintiff in error as to his having previously been in the penitentiary, nor are we obliged in this case to determine whether the court may take into consideration information so obtained from the prisoner in fixing his punishment for the crime of which he stands convicted. The law fixes the punishment for the crime of

robbery, of which the plaintiff in error was convicted, at imprisonment in the penitentiary for not less than three and not more than fifteen years. In this case, as already stated, the plaintiff in error was sentenced to the state penitentiary for seven years. If the district judge in fixing this punishment took into consideration that the plaintiff had previously been twice in the penitentiary, such fact does not appear in the record. The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment—within the limits of the statute—according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition and the previous good character of the person convicted. True the district court may determine what penalty shall be imposed solely from the evidence produced before the jury on the trial, but we do not think that the court is confined to that evidence alone in fixing the punishment. When the prisoner is inquired of by the court whether he has anything to say why judgment should not be pronounced against him he may make such statements of his previous good behavior, of his previous good character, of his age, of his condition at the time he committed the offense, and the influences which were brought to bear upon him and led to his commission of the crime as may induce the court “to temper justice with mercy” and to give the prisoner the least punishment provided for by the statute; and we cannot say that such action on his part would be an abuse of his discretion.

3. On the trial the state introduced evidence which tended to show that on the night of the 14th of April, 1893, one Osterlow was in the city of Lincoln intoxicated and drinking intoxicants; that about midnight Osterlow got into a hack at a hotel for the purpose of driving to his

home. The plaintiff in error, who was a hack driver, and two other hack drivers were also in or on the hack. They drove the hack in which Osterlow was to the outskirts of the city near a park where there were few people living. There they stopped the hack, jerked Osterlow out, knocked him down, demanded his money, and one of the three put his hand in Osterlow's pocket and took therefrom silver amounting to about three dollars. In the scuffle Osterlow held in his hand two five-dollar bills, and one of the parties in attempting to take these bills from Osterlow's hand tore them in two. The three parties then drove away, leaving Osterlow on the ground and in possession of the torn five-dollar bills, or the two pieces of said bills. On the trial the state offered in evidence these two parts of said two five-dollar bills which had been retained by Osterlow. To this evidence the plaintiff in error objected, on the ground that the indictment charged the plaintiff with robbing Osterlow of \$14.50, "of good and lawful money of the United States;" that the torn bills offered in evidence had not been proven to be good and lawful money of the United States, and it had not been shown that they had any value. The objection was overruled, the torn bills admitted in evidence, and this ruling of the district court is now assigned as error. Conceding that these torn bills had not been shown to be good and lawful money of the United States, and had not been shown to have any value, we still think that the court did not err in permitting the torn bills to be introduced in evidence. These bills tended to corroborate the evidence of Osterlow as to the felonious assault made upon him by the plaintiff in error and the others with intent to rob him. These torn bills were the results of what occurred at the time the assault with intent to rob was made, and for that reason alone, if for no other, they were admissible in evidence. Everything said and done at the time of the felonious assault was competent evidence as being a part of that transaction.

4. The plaintiff in error requested the court to charge the jury as follows: "If you find from the evidence that no money was taken from the person or custody of the prosecuting witness, Osterlow, at the time of the alleged robbery, then the defendant is not guilty of the crime charged in the information, and it is your duty to return a verdict accordingly. In considering whether or not any money was so taken, it is the duty of the state to prove beyond a reasonable doubt that some money *other than the torn bills* was so taken, or to prove that the defendant took, or assisted in taking, such *torn bills*, and that *the parts of such torn bills thus taken were redeemable at their former full value.*" The refusal of the district court to give this instruction is the next error assigned here. The instruction was requested upon the theory that as the plaintiff in error was charged in the information with having robbed Osterlow of \$14.50, of good and lawful money of the United States, it was incumbent upon the state to prove beyond a reasonable doubt that whatever money was taken from Osterlow by the plaintiff in error, or his accomplices, was in fact good and lawful money of the United States. Section 420 of the Criminal Code provides: "In every indictment in which it shall be necessary to make any averment as to any money, or bank bill, or notes, United States treasury notes, postal and fractional currency, or other bills, bonds, or notes, issued by lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money or bills, notes, currency, or bonds, simply as money, without specifying any particular coin, note, bill or bond; and such allegation shall be sustained by proof of any amount of coin or of any such note bill, currency, or bond, although the particular species of coin of which such amount was composed, or the particular nature of such note, bill, currency, or bond shall not be proved." In view of this provision of the Criminal Code we think that the expression in the information, "good and lawful

Tracey v. State.

money of the United States," was surplusage, and that the state, in order to convict, was not bound to prove that the money of which Osterlow was robbed was good and lawful money of the United States. We are aware that a contrary conclusion was reached in *Taylor v. State*, 29 N. E. Rep. [Ind.], 415, in which state there is a statute almost identical with ours quoted above. We do not know how the supreme court of Indiana reached the conclusion it did in view of the statute. With all due deference to that court we feel bound to follow the express provision of our statute rather than the decision. In *Coffelt v. State*, 11 S. W. Rep. [Tex.], 639, it was held, where an indictment for robbery alleged that the money taken was "good and lawful money of the United States," that in order to convict the state was compelled to prove that the money was of the character alleged in the information. In the absence of a statutory provision, such as ours, we have no doubt but that is correct. The court did not err in refusing to give this instruction.

5. The court modified the instruction quoted above, requested by the plaintiff in error, by drawing a line with a pen through the words in italics in said instruction, and as thus modified gave the instruction. The action of the court in giving the instruction as thus modified by interlineation and erasure is another of the errors assigned here by the plaintiff in error. Section 53, chapter 19, Compiled Statutes, provides: "If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification, shall not be by interlineation or erasure, but shall be well defined and shall follow some such characterizing words, as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." There can be no doubt but that the district judge—doubtless unwittingly—disregarded this plain provision of the statute in giving to the jury this instruction erased and interlined as it was;

but the instruction was not excepted to on that account, and the instruction as originally drawn, we have seen, was one to which the plaintiff in error was not entitled and the instruction as given by the court correctly stated the law. The assignment must therefore be overruled. To secure the reversal of a judgment of a district court it is not enough, in an error proceeding, to establish the fact that the court erred, but it must appear from the record that there was an exception to the act and that such error may have prejudiced the party complaining of it. In other words, it must appear that the error of the court may have caused or contributed to the judgment complained of.

6. Another error assigned is that the verdict of the jury is not supported by sufficient evidence. Without summarizing it here we have not the slightest doubt but that it is. If all consideration of the evidence relating to the two five-dollar bills which Osterlow claims he had in his possession at the time he was assaulted by the plaintiff in error and his accomplices be disregarded, there is sufficient evidence remaining in the record to show that the plaintiff in error and his accomplices, at the time they assaulted Osterlow, robbed him of three dollars of silver.

Counsel for the plaintiff in error also indulges in criticisms upon certain other instructions given by the trial court. We have carefully examined all these instructions and find no criticism which we think merits our further attention. The judgment of the district court is in all things

AFFIRMED.

ELIZABETH GALLIGHER, APPELLANT, V. WILLIAM J.
CONNELL ET AL., APPELLEES.

FILED NOVEMBER 8, 1895. No. 5515.

Quieting Title: STARE DECISIS. The facts in this case and the law applicable thereto are substantially the same as those in *Connell v. Galligher*, 36 Neb., 749, and 39 Neb., 793, and following these cases, the decree is affirmed.

APPEAL from the district court of Douglas county.
Heard below before DOANE, J.

Gregory, Day & Day, for appellant.

Connell & Ives, contra.

RAGAN, C.

This is in appeal from a decree of the district court of Douglas county. The action was one in equity brought by Mrs. Galligher against Connell and others to have quieted and confirmed in her the title to certain real estate. The real estate involved is a part of the tracts, the title to which was litigated in *Connell v. Galligher*, 36 Neb., 749, 39 Neb., 793. The decision of the court in this last case controls and supports the decree appealed from. In the case at bar the district court found specially that Connell was the owner of the legal title to the premises in controversy. This finding was correct under the facts in evidence and the law. (See *Connell v. Galligher*, 36 and 39 Neb., *supra*, in which the evidence was substantially the same as in the case under consideration.) But this conclusion of the district court was correct, if we omit all consideration of *Connell v. Galligher*, 36 and 39 Neb., *supra*, and the evidence on which those decisions were based, for the reason in the case at bar Connell, among other defenses, pleaded that he and

State v. Moore.

his grantors had been in the open, notorious, exclusive, and adverse possession of the premises in controversy, claiming title thereto, for more than ten years before Mrs. Galligher brought this suit. The evidence in the record sustains such defense. The decree of the district court is

AFFIRMED.

IRVINE, C., not sitting.

STATE OF NEBRASKA, EX REL. BOARD OF REGENTS
OF THE UNIVERSITY OF NEBRASKA, V. EUGENE
MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED NOVEMBER 8, 1895. No. 7997.

Vouchers: CLAIMS AGAINST STATE UNIVERSITY. Session Laws, 1895, chapter 65, providing for a uniform system of vouchers, applies to claims against the state university.

ORIGINAL application for *mandamus* to compel the respondent to issue a warrant in payment for property purchased for the use of the University of Nebraska in accordance with the certificate of the board of regents. *Writ denied.*

Ricketts & Wilson, for relator.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, *contra.*

IRVINE, C.

The relator alleges that it purchased of one Beruh Liebisch certain philosophical treatises for the use of the University of Nebraska, to the value and at the agreed price of \$22.06; that on June 26, 1895, the board of regents

having audited the account, found the same correct and issued its certificate, signed by its president and secretary, to the effect that Liebisch was entitled to payment of that amount from the appropriation of 1895, account current expenses, and directing the respondent to draw his warrant therefor on the university fund; that thereafter the board caused said certificate to be presented on behalf of Liebisch to the respondent, Liebisch being a resident of Germany; that the respondent refused to draw a warrant for the reason that the account was not verified and vouchered as provided by Session Laws of 1895, chapter 65. It is further averred that there was in the treasury of the state to the credit of the temporary university fund at that time the sum of \$9,872.50. The relator prays for a writ of *mandamus* commanding the respondent to issue a warrant to Liebisch in accordance with the certificate. To this petition the auditor demurs. Session Laws of 1895, chapter 65, is entitled "An act to provide for a uniform system of vouchers for use for all disbursements of the state's funds, through the auditing and treasury departments of the state, and to provide for the affixing of an oath or affirmation thereto by the claimant, and to provide a penalty for the violation thereof." The act in its first section provides that within thirty days after its passage and approval the auditor shall prepare blank forms of vouchers for use in all the state's departments and for use of "all manner of claimants against the state who receive their pay by warrant drawn by the auditor upon the state treasurer." Other provisions of the section relate to the issuance of such vouchers in original, duplicate, and triplicate forms, as necessities of the especial institutions may require. Section 2 provides: "All claims against the state to be paid as hereinbefore provided shall be extended in full on the voucher and fully and carefully itemized, and accompanied in all instances, where possible, with the original bill or item of expense. Said bills or items, and each of them,

shall give the exact date of purchase or service rendered, quantity purchased, name of article or service, price per item, and total, and shall be properly signed by the party to whom the claim is payable, or his or its agent or attorney, or a member of the firm, and shall be signed in full by the name of the claimant," etc. Section 3 provides that with the original voucher there shall be an affidavit in form prescribed by the section. The remaining sections of the act are not material to the present inquiry. If this act is applicable to such claims as that now presented, neither the relator nor the claimant has shown a compliance therewith, and the writ must be denied. The question presented is, therefore, whether the act referred to applies to claims against the university.

The university derives its revenue in part from a state tax and in part from the proceeds of two grants of land by the federal government. One of these grants was by the act of congress of July 2, 1862, commonly known as the "Morrill Act." The other was contained in the enabling act of April 19, 1864, section 10 of which granted seventy-two sections of land for the use and support of a state university, to be appropriated and applied as the legislature might prescribe for the purpose named, and for no other purpose. The first state constitution contained no provision relating to either of these grants, except in sections 1 and 2 of article 7, providing that the principal of all funds arising from the sale of land granted to the state for educational purposes shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations, and that the university lands and other educational lands shall not be sold at less than \$5 an acre. The present constitution contains in different sections substantially similar provisions, but the minimum price of sale is changed; and it is provided that the general government of the university shall, under direction of the legisla-

ture, be vested in a board of regents, whose duties and powers shall be prescribed by law. (Constitution, art. 8, sec. 10.) There was no legislation to create the university or to give effect to these grants until 1869, when a comprehensive act was passed. (Session Laws, 1869, p. 172.) Under this act the university was created, and its general government vested in a board of regents, who are constituted a body corporate, and empowered as such to sue and be sued, to make and use a common seal, to acquire real and personal property for the use of the university and to dispose of the same whenever the university can be advantaged thereby. The only limitation to the power of the board in this respect was that they should not dispose of grounds upon which any building of the university should be located without the consent of the legislature. By this act as subsequently amended the funds of the university were declared to be two—the endowment fund and the regents' fund. The endowment fund consisted of the proceeds of the sales of lands and funds acquired by donation or bequest. The regents' fund consisted of the proceeds of investment of the endowment fund, of the rental of lands leased, tuition and text-book fees, and the state tax. In other words, the endowment fund was the principal and the regents' fund the income available for use. By act of March 2, 1870, the state treasurer was made the custodian of the endowment fund and he was required to pay over monthly to the treasury of the university all moneys accruing to the regents' fund. The treasurer of the university was authorized to pay moneys out of this fund on warrants drawn upon the secretary and countersigned by the president of the board of regents. In 1875 an act was passed (Session Laws, 1875, p. 154), entitled "An act providing for the more efficient government of the state university and for the disposition of funds belonging thereto." By this act the office of treasurer of the university was abolished and the state treasurer "made custodian of the

funds," the treasurer of the university being directed within sixty days to turn over to him all moneys, securities, books, and papers pertaining to his office. This act also provided that disbursements from the university fund should be made by the state treasurer upon warrants drawn by the auditor, who should issue warrants upon certificates issued by the board of regents, signed by the secretary and president. It also provided that all money accruing to the university was thereby appropriated to the use of the university. So the legislation stood until the act of 1895 was passed. In 1877 the effect of this legislation was drawn in question in the case of the *Regents v. McConnell*, 5 Neb., 423. This was an action by the regents to recover from McCounell certain moneys belonging to the regents' fund which had come into his hands as treasurer of the university and which he refused to turn over to the state treasurer as required by the act of 1875. The court reviewed the legislation down to that time and declared that the board of regents of the university was not a private eleemosynary corporation, because its whole interest and franchises are the exclusive property and domain of the government itself; that it was a public corporation, and but a part of the machinery employed in carrying on the affairs of state; that upon such corporation the legislature had power to impose such modifications, extensions, or restraints as the general interest and public exigencies may require; that the rights of such corporation never become vested as against the state; that the effect of the act of 1875 was to take from the treasurer of the university the control of the regents' fund and make the state treasurer its custodian, "to be disbursed by him upon warrants drawn by the state auditor in the same manner as funds appropriated for the support of other state institutions not incorporated are disbursed." The court further said that by virtue of the act of 1875 "the custody and control of these funds are taken from the corporation and placed in the custody of the state treasurer for disbursement; and under the settled doctrine

of the law, in respect to public corporations of this kind, the legislature had the undoubted authority to take these funds from the custody of the corporation and divest it of any corporate power over them, and having done so, we think it clear that the regents, as such corporation, have no authority in law to bring or maintain this action." Here then, two years after the passage of the act of 1875, and eighteen years ago, the court construed it as taking from the board of regents the control of the regents' fund and vesting it in the state treasurer, to be disbursed in the same manner as funds of other state institutions, and the logic of the decision reduced the university very much to the same position as other state institutions, although its distinct corporate character was affirmed. In *State v. Liedtke*, 9 Neb., 468, the court said: "Upon careful examination of the several acts of the legislature and constitutional provisions applicable to this question, we are forced to the conclusion that it was the intention of the legislature, which passed the act of February 23, 1875 (Session Laws, 1875, p. 154), that all moneys belonging to the university fund then in the hands of the treasurer of the board of regents should not only be paid over to the state treasurer, but should thereupon be covered into the state treasury, and that thereafter all like funds, upon reaching the hands of the state treasurer, would by force of law be covered into the state treasury." The court therefore held that the state treasurer acted in receiving and paying out the revenues of the university in his capacity as state treasurer, and not as treasurer of the university, and that no funds could be drawn except in pursuance of a specific appropriation. The doctrine of these two cases was reaffirmed in *State v. Babcock*, 17 Neb., 610, Chief Justice COBB dissenting, but unfortunately not writing an opinion to support his dissent; and the same line of reasoning controlled the decision in *State v. Moore*, 36 Neb., 579.

It is argued that the act of 1895 does not in terms apply

to claims against the university; that it relates only to claims against the state; that the university, being a body corporate, capable of being sued, its debts are to be enforced by suit and judgment against the corporation; that the state is not liable therefor, and its creditors are not claimants against the state; and further, that the act of 1895, if construed to apply to claims against the university, would be unconstitutional, as abridging and restricting the constitutional powers of the board of regents. We think the argument addressed to the construction of the act cannot be maintained without disregarding the decisions we have cited. For eighteen years it has been held that the university is merely a state institution and its board of regents a state agent; that the funds of the university were by the act of 1875 not merely entrusted to the state treasurer as custodian for the university, but were covered into the treasury and became a part of the state's funds entrusted to him in his official capacity as state treasurer; that for the withdrawal of such funds specific appropriations are necessary, as in the case of other state institutions. Hence the logical conclusion that the constitutional provisions and legislative enactments in regard to drawing of warrants by the auditor must apply. The legislature in passing the act of 1895, must be presumed to have had in contemplation these decisions, and the construction so given by this court to the legislation affecting the university, and, therefore, in using the term "claims against the state" it was not the legislative intent to except from the operation of the act claims against the university. So far as the constitutional question is concerned, it will be observed that while the constitution vests the general government of the university in the board of regents, this government is to be "under direction of the legislature," and the powers and duties of the board are merely such as "shall be prescribed by law;" that is, by the legislature. The decisions already cited necessarily imply such a construction of this provision as

permits to the legislature the greatest latitude in extending or restricting these duties and powers. In *Regents v. McConnell*, *supra*, it was clearly the view of the court that the vesting of the general government of the university in the board of regents did not prevent the legislature from depriving the board of the control of the university funds. The act of 1895 is complete in itself, relating generally to the forms and requisites of vouchers, and must be held to have operated an implied repeal of that part of the act of 1875 which required warrants to be issued on the certificate of the board of regents. Claims against the university must be presented to the auditor upon vouchers drawn in conformity with the act of 1895.

The foregoing has been written merely from the standpoint of authority. We do not feel that decisions which have so long controlled the operations of the board of regents, of state officers, and of the legislature itself, in matters affecting the university, should be overruled if such a course can be avoided, and this case cannot be otherwise resolved without overruling those decisions; but we feel that we would be placing ourselves in a false attitude did we not before leaving this subject express our opinion to the effect that our minds do not assent to the reasoning of the line of decisions referred to. Were the question a new one, we would take an entirely different view, both of the validity and the construction of the act of 1875.

WRIT DENIED.

NORFOLK NATIONAL BANK V. P. SCHWENK &
COMPANY.

FILED NOVEMBER 19, 1895. No. 5808.

1. **USURY: ACTION FOR PENALTY: LIMITATION.** An action against a national bank to recover the penalty provided in section 5198 of the Revised Statutes of the United States, for knowingly taking and receiving usurious interest, must be brought in two years from the time the usurious transaction occurred. (*First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.)
2. ———: ———: **SET-OFF.** Following the decisions of the supreme court of the United States, it was held that usurious interest paid a national bank on a note cannot be applied by way of set-off or payment against the principal sum due in any suit by the bank upon such note.
3. **National Banks: USURY.** Where a national bank knowingly charges usurious interest upon a loan of money which is included in the note, in an action to enforce the contract, the entire interest is forfeited. Where illegal interest has been paid to a national bank, the borrower may recover double the amount of interest actually paid, if the action is brought within two years after such payment is made.

ERROR from the district court of Madison county. Tried below before NORRIS, J.

Powers & Hays, for plaintiff in error, cited: *Driesbach v. Second Nat. Bank*, 14 Otto [U. S.], 52; *Farmers & Mechanics Bank v. Hoagland*, 7 Fed. Rep., 159; *Barnet v. Second Nat. Bank*, 98 U. S., 555; *Higley v. First Nat. Bank*, 26 O. St., 75; *Central Nat. Bank v. Pratt*, 115 Mass., 539.

Barnes & Tyler, H. C. Brome, and B. T. White, contra, cited: *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y., 95; *Hintermister v. First Nat. Bank of Chittenango*, 64 N. Y., 212; *National Bank of Auburn v. Lewis*, 75 N. Y.,

Norfolk Nat. Bank v. Schwenk.

516; *First Nat. Bank v. Commonwealth*, 9 Wall. [U. S.], 353.

E. K. Valentine, also for defendants in error.

NORVAL, C. J.

This action was brought in the court below on the 5th day of August, 1889, by Peter Schwenk & Co. under the provisions of section 5198 of the Revised Statutes of the United States to recover the penalty therein prescribed for taking and receiving usurious interest. The petition contains thirty-eight counts, which are substantially alike, excepting as to the date and amount of the loans made by the defendant to the plaintiffs, and the date and amount of illegal interest paid on such loans.

The first count alleges, in effect, that on the 5th day of August, 1889, the plaintiffs, as principals, and T. H. Eghert, as surety, executed and delivered to the Norfolk National Bank their promissory note, therein set forth, payable to the order of said bank, calling for the sum of \$582.80, due in sixty days, with interest at ten per cent per annum from maturity; that at the same time plaintiffs paid to the defendant and the defendant unlawfully and wrongfully received as interest upon said note, from the date thereof until its maturity, the sum of \$11.65, the same being interest at the rate of twelve per cent per annum in advance, and that by reason of the premises defendant became and is justly indebted to plaintiffs in the sum of \$23.30, no part of which has been paid. The amount of usurious interest alleged in the other thirty-seven counts of the petition to have been paid by the plaintiffs, and unlawfully and knowingly received by the defendant, aggregate the sum of \$1,046.25. The plaintiffs pray judgment for double the amount of interest alleged to have been paid, to-wit, the sum of \$2,139.10. The defendant answered denying each and every allegation

of the petition, and set up, as a cross-demand against the plaintiffs, the sum of \$3,500 due upon three promissory notes executed and delivered by the plaintiffs to the bank, described as follows: One for \$1,500, dated May 1, 1889, and due in ninety days thereafter; one for the sum of \$1,000, of the date of May 4, 1889, due in ninety days from date; and one for \$1,000, dated April 19, 1889, maturing in ninety days from date. The notes called for ten per cent interest from maturity. The answer further avers that said notes are wholly unpaid and that each one arose out of the contracts and transactions set up in the petition, is connected with the subject of the action, and is a renewal of one of the notes described in the petition. The defendant asks judgment against the plaintiffs for the sum of \$3,500, with ten per cent interest thereon, according to the terms of said notes. To this answer the plaintiffs replied, admitting the execution and delivery of the notes and the non-payment thereof, and alleged, in substance and effect, that said notes were renewals of the notes previously given to the defendant for various loans of money; that defendant at the time contracted for, exacted, and received, and the plaintiffs paid, as illegal interest on said original notes and renewals thereof for the use of the amounts borrowed, the sum of \$833.50, which, together with the sum of \$2,139.10 demanded in the petition, plaintiffs ask to have applied as payments on the notes forming the basis of the defendant's counter-claims or cross-demands.

Upon a trial of the issues to a jury, the following verdict was returned:

"We, the jury impaneled and sworn in the above entitled cause, do find as follows:

"1. We find for the plaintiffs P. Schwenk & Co. on the several causes of action set out in their petition, the sum of \$2,139.10.

"2. We do further find for the defendant the Norfolk National Bank, on its several causes of action set up in the answer, the sum of \$3,500.

"3. We do further find for the plaintiffs P. Schwenk & Co., on the several counter-claims or offsets set up in the reply, the sum of \$802.50.

"And we further find that there is due from the plaintiffs to the defendant (the balance) the sum of \$538.40."

From a judgment for the defendant entered on the verdict for \$538.40, and from an order denying the motion for a new trial, the bank prosecutes a petition in error to this court. The evidence introduced on behalf of the plaintiffs below tended to sustain the averments contained in the several counts of the petition, and the jury found for the plaintiffs for the full amount claimed.

The main ground urged for a reversal of the judgment, and the only one decided, is that the plaintiffs were allowed, as a set-off against the notes described in the answer, the sum of \$802.50, on account of usurious interest paid by the plaintiffs to the bank on the loans evidenced by said notes. It appears from the pleadings and evidence that the bank made the plaintiffs below loans upon the dates and for the amounts following: January 14, 1886, \$1,000; June 16, 1885, \$1,500; and May 11, 1886, \$1,500. Plaintiffs at the same time executed their promissory notes for the respective sums, which were renewed from time to time, the notes set up in the answer being the last renewals thereof. On the making of the several loans and upon each renewal note, the plaintiffs paid the bank interest exceeding the lawful rate, all of said payments having been made more than two years prior to the bringing of this suit. The question is squarely presented whether the amount of interest paid a national bank on a usurious loan of money can be applied as a payment on the note given for the sum lent in an action brought to recover the principal sum? Section 5, chapter 44, of the Compiled Statutes of this state declares: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void ;

but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." There is no room for doubt that, as a general rule, where a loan is tainted with the vice of usury, in an action by the lender, to recover the debt, under the foregoing provision, all payments of interest by the borrower must be applied as payments *pro tanto* of the principal. (*Nelson v. Hurford*, 11 Neb., 465; *Knox v. Williams*, 24 Neb., 630; *Blackwell v. Wright*, 27 Neb., 269.)

It is contended that the statute of this state above quoted does not apply to national banks in so far as it allows all sums paid as usurious interest to be credited as a payment upon the principal debt, but that section 5198 of the Revised Statutes of the United States alone determines the penalties that shall be imposed upon national banks for exacting illegal interest. This section provides: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it and which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred." The foregoing section has more than once been under consideration by this court. In construing its provisions in the case of *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99, it was said: "It is apparent that this section covers two classes of cases. The last clause

provides that when illegal interest has been paid to a national bank double the amount so paid may be recovered back, while under the first clause of the section, if usurious interest has been knowingly charged, but not paid, a recovery can only be had for the amount borrowed; in other words, where illegal interest has been added into the note, but not paid, it cannot be recovered in an action brought for that purpose." The case was followed with approval in *McGhee v. First Nat. Bank of Tobias*, 40 Neb., 92. Under said section 5198, the loaning of money by a national bank at a usurious rate forfeits all interest, and in case interest has been paid on such a contract, the borrower may recover double the amount thereof where the action is brought within two years after such payment; but the federal statute contains no provision which authorizes the applying of payments of usurious interest upon the principal sum, while the statute of this state permits the deduction of interest payments from the principal.

Which statute should govern and control in this case? If the only remedy afforded the borrower, and the only penalty imposed upon a national bank, is that prescribed by said section 5198, it is clear that the plaintiffs below were not entitled to recoup from the face of the three notes set up in the answer any sum whatever on account of usurious interest paid thereon to the bank. It has been held in some of the sister states that national banks are not exempt from the penalties imposed by state laws for exacting usurious interest by such banking institutions. In other words, where a national bank makes a usurious loan and the statute of the state where the bank is located declares that the lender in such case should forfeit all interest, credit must be given for all the interest which has been paid on the contract. This court, likewise, without considering the point whether national banks are amenable to state laws relating to usury, has applied the interest paid on a loan of money tainted with the vice of usury as an offset

against the principal of the note. (*Exeter Nat. Bank v. Orchard*, 39 Neb., 485; *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99.) Now our attention has been challenged to the fact that the supreme court of the United States has announced a contrary doctrine. Mr. Justice Swayne, in delivering the opinion of the court in *Farmers & Mechanics Nat. Bank v. Dearing*, 1 Otto, 29, in construing the provisions of section 5198 of the Revised Statutes of the United States, uses this language: "The national banks, organized under the act, are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as congress may see proper to permit.

* * * The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence of the general government, otherwise it would be liable in the discharge of its most important trusts to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of congress. Whenever the will of the

nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise, shall recur. * * * It must always be borne in mind that the constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each state, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section [Revised Statutes, 5198] the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the state where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one state, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of congress." In the case from which the above quotation was taken it was held that a national bank is not liable to the penalties imposed by the usury laws of a state, reversing the decision of the court of appeal of the state of New York upon that question. The case in 1 Otto was reaffirmed in *Barnett v. Second Nat. Bank of Cincinnati*, 8 Otto [U. S.], 555; *Driesbach v. Second Nat. Bank of Wilkes Barre*, 14 Otto [U. S.], 52, and *Stephens v. Monongahela Bank*, 111 U. S., 197, the court in these several cases holding that in an action by the bank on a note given as a renewal of a usurious loan, usurious interest paid thereon could not be applied to the discharge of the principal debt. The same doctrine has been held by other courts. (*Farmers & Mechanics Bank of Mercer v. Hoagland*, 7 Fed. Rep., 159; *Central Nat. Bank v. Pratt*, 115 Mass., 539; *Davis v. Randall*, 115 Mass., 547; *Higley v. First Nat. Bank of Beverly*, 26 O. St., 75; *Huggins v. Citizens Nat. Bank of Kansas City*, 24

S. W. Rep. [Tex.], 926; *Rockwell v. Farmers Nat. Bank of Longmont*, 36 Pac. Rep. [Colo.], 905.)

It is insisted by counsel for defendants in error that congress, by the removal act of March 3, 1887, as corrected by the act of August 13, 1888, has subjected national banks to the laws of the respective states where they are located, so far as remedies are provided for the wrongs they may perpetrate. In the first subdivision of the act mentioned above it is provided: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located." This language cannot be construed as making national banks liable to the penalties fixed by a state for exacting unlawful interest. The object and purpose of congress was to prevent the removal from the state to the federal courts of causes in which national banks are parties.

Whatever may be our own views of the question under consideration, we feel bound to keep in line with the decisions of the highest court of the land—the supreme court of the United States—upon all matters of which it is the final arbiter. It follows that the district court erred in allowing the plaintiffs below to offset against the three notes set up in the answer the amount paid the bank as interest on the usurious transactions. For the error pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

PATRICK FORD, JR., v. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. No. 7091.

1. **Jury: RULINGS ON CHALLENGES: MOTION FOR NEW TRIAL: REVIEW.** Alleged errors in overruling challenges to jurors for cause will not be reviewed by the appellate court where they were not called to the attention of the trial court in the motion for a new trial.
2. **Trial: OBJECTIONS TO EVIDENCE: WAIVER.** Where objection to the materiality or relevancy of testimony is not made when offered, and before it has gone to the jury, ordinarily it should be deemed waived.
3. ———: **EXCLUSION OF EVIDENCE: HARMLESS ERROR.** It is not reversible error to exclude testimony, where the fact attempted to be proved has been fully established by uncontradicted evidence.
4. ———: ———: **REVIEW.** Where a question is asked a witness on the examination in chief, to which objection is made, and sustained by the court, in order to obtain a review of the ruling the party desiring the evidence must offer to prove the facts sought to be elicited by the question.
5. **Review: TRANSCRIPT.** The transcript of the record filed in this court imports absolute verity. If incorrect, or it fails to speak the truth, the correction must be made in the trial court and not in this court.
6. **Criminal Law: INSTRUCTION AND ARGUMENT AS TO PENALTY.** Where the jury are not required to fix the punishment in a criminal prosecution, it is not error for the trial judge to refuse to instruct them as to the penalty prescribed by statute for the offense, or to permit that question to be argued to the jury.
7. **Larceny: INSTRUCTIONS.** In a prosecution for larceny as bailee, an instruction which fails to charge that the original taking of the property must be felonious is not for that reason erroneous. The gist of the offense in such a prosecution is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same.
8. ———: ———. *Held,* That the charge of the court, to the effect that every sane person is presumed to intend the natural and

Ford v. State.

probable consequences of his voluntary acts, was not only abstractly correct, but was applicable to the case made by the evidence.

9. **Intoxication as Defense: INSTRUCTIONS.** *Held*, That the sixth instruction correctly stated the rule relating to the defense of intoxication.
10. **Instructions.** It is a well settled rule that instructions should be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
11. ———: **REVIEW.** The supreme court will not reverse a case for the refusing of an instruction, where the substance thereof has been given in other instructions.
12. **Larceny: EVIDENCE.** Evidence examined, and *held* sufficient to sustain a conviction of larceny as bailee.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Mahoney, Minahan & Smyth, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state.

NORVAL, C. J.

The plaintiff in error stands convicted of the offense of larceny, as bailee, of a diamond ring of a value of more than \$35, the property of one Catlin. The material and undisputed facts in the case, as disclosed by the bill of exceptions, are substantially as follows: Patrick Ford, Jr., the plaintiff in error, resided in the city of Fremont. A short time prior to the 7th day of March, 1894, he applied to the superintendent of the Fremont, Elkhorn & Missouri Valley Railroad Company for the position of brakeman on that road, and was informed that in the near future he would be given work. After waiting a few days he made a visit to his parents' home, in the city of Omaha, and while there, on the morning of the date above stated, he received word, to the effect, that if he returned to Fre-

Ford v. State.

mont he could secure the promised position as brakeman. He replied that he would be there in the morning. During the day of March 7 he drank intoxicating liquors, and by night he was somewhat under their influence. He continued to drink intoxicants until about 11 o'clock in the evening, when he entered the saloon of Wright & Coleman on South Twelfth street, where he met Charles Catlin, an old acquaintance, and the prosecuting witness. Ford invited Catlin and others to drink with him, which they did. Catlin was wearing a diamond ring of the value of \$55, which Ford saw, and the latter said, "That's a nice ring. Let's see it. Take it off." Catlin removed the ring, handed it to Ford, who put it on his finger and displayed it to those present. Afterwards Ford suggested that they visit Pat Horrigan's saloon, located at Twelfth and Davenport, and as they started, Catlin asked for the ring. Ford replied, "I will let you have it in a few minutes. I want to go up there and flash it." Upon reaching Horrigan's they drank together two or three times, and then they went to Martin Shields' saloon, which was just closing, and they passed by, stopping at Ella Mitchell's for a short time. From there they returned to Horrigan's, and, after taking several drinks, they went back to Ella Mitchell's. Both went into the house together, and after they had been there a few minutes, Ford went out of the back door, saying that he was going to the water closet. He failed to return, and Catlin did not see him again. About 8 o'clock in the morning of March 8, Ford, under the assumed name of Meyers, went to the pawn shop of H. Friedman, borrowed \$10 of him and pawned therefor Mr. Catlin's ring. Mr. Ford signed the pawnbroker's book "Jim Meyers, 1024 Davenport street." In the forenoon of the same day Ford went to Fremont, but claims he has no recollection of what he had done until he awoke about noon, when he found himself in Gannon's grocery store in Fremont. At this time Mr. Gannon, with whom he was

acquainted, gave Ford a cigar, and the latter, on putting his hand in his pocket to procure a match with which to light the cigar, discovered the pawn ticket which he had received for the ring. Within a brief period he wrote a letter to Catlin, informing him what he had done with the ring and inclosing therein the pawn ticket, which Catlin received the same day. Ford went to work for the railroad company, and two or three weeks later he was arrested for stealing the ring.

The first complaint made in the brief relates to the overruling of the prisoner's challenge for cause of juror Coombs. The ruling just referred to cannot be reviewed, since the attention of the trial court was not challenged to the same by the motion for a new trial. It is too firmly settled in this state to require the citation of authorities in support thereof that allegations of error will be disregarded, upon a review of a cause in this court by petition in error, where they are not pointed out in the motion for a new trial.

Upon the trial one John Wright was called and examined as a witness on behalf of the state. On his direct examination he was asked by the county attorney this question: "You may state whether or not that ring which you hold on your hand, which is marked 'Exhibit 1' in this case, is the ring which you saw on the hand of Pat Ford the evening of March 7, to the best of your knowledge." The witness answered, "It is, to the best of my knowledge;" whereupon the defendant moved to strike the answer as immaterial and incompetent, which was overruled, and an exception was entered. This ruling is presented for review by the second assignment of error. The answer responded to the question. If it was incompetent or immaterial to the issues, an objection should have been made on that ground when the interrogatory was put to the witness. It is too late to raise such objections, after the answer of the witness had been taken, without objection.

(*Palmer v. Witcherly*, 15 Neb., 98; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1.) In no event, even though this evidence was incompetent, could a reversal be had for that reason, since it was conclusively established by other uncontradicted testimony that Exhibit 1 was the identical ring which Mr. Catlin owned and which he let the prisoner have. Moreover, we are satisfied that the testimony of Mr. Wright, to which objection was made, was admissible. True, the witness testified concerning the identity of the ring to the best of his knowledge. It was only from his knowledge of the matter that he could speak. If the defendant had desired to ascertain the witness' means of information of the matter he should have interrogated him in regard thereto.

The third, fourth, fifth, seventh, and eighth assignments of error are not well taken. They are based upon the refusal of the trial court to permit certain witnesses to answer questions framed for the purpose of eliciting the condition of the defendant as to his being under the influence of liquors on March 7. It had already been shown that the defendant was drinking heavily, where, how often, and the kind of liquors he drank, and the effect they had upon him. There was no dispute among the witnesses upon that point, and had the testimony excluded been received, it only would have been cumulative in its nature.

By the ninth assignment is presented the ruling of the court in sustaining the objection of the state to the question asked the accused as to whether or not he had any sleep between the time he left Mitchell's place and the time he reached Fremont. The decision of court upon this point cannot be reviewed, since no offer was made in the court below to prove the fact sought to be elicited by the interrogatory. (*Kearney County v. Kent*, 5 Neb., 227; *Masters v. Marsh*, 19 Neb., 458; *Mathews v. State*, 19 Neb., 330; *Lipscomb v. Lyon*, 19 Neb., 511; *Connelly v. Edgerton*, 22 Neb., 82; *Burns v. City of Fairmont*, 28 Neb., 866.)

Two assignments, the tenth and eleventh, relate to the remarks of the trial judge during the argument of the cause to the jury. In support of the charge of misconduct imputed to the judge were read the affidavits of the accused, his attorney, C. J. Smyth, W. S. Shoemaker, Lee Herdman, and Oscar J. Pichard. Opposing these are the affidavits of Mr. Slabaugh, the deputy county attorney, and Mr. Henderson, the court stenographer. The record also contains the statement of the presiding judge, of what was said and done. It is not important that we stop and consider whether the language used by the court was prejudicial or not, since the record fails to disclose that the attorney for the accused excepted thereto at the time, but shows whatever exception was made was only to a remark confessedly unprejudicial. It should be stated that so far as the affidavits are concerned those filed on behalf of the prisoner show a proper exception was taken, while the counter-affidavits show such was not the fact. Whether a party excepts to a ruling, or to the conduct of the trial judge, must be determined alone from the record; an issue of fact cannot be made thereon in this court. The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here. (*Weander v. Johnson*, 42 Neb., 117.) The record failing to disclose any exception to the remarks of the trial judge, of which complaint is here made, the same cannot be reviewed.

What has been said disposes of the thirteenth assignment of error, which is that the court erred in not informing the defendant of the verdict of the jury, and in not asking him whether he had anything to say why sentence should not be pronounced against him. Unfortunately for the accused this assignment is not supported by the record. The journal entry in the case, a certified copy of which is before us, affirmatively shows that the prisoner, on being arraigned for sentence and judgment, was informed of the verdict

Ford v. State.

and of the penalty provided by law for the crime of which he had been found guilty, and was asked by the court if he had anything to say why sentence of the court should not then be pronounced against him, and the defendant replied he had nothing to say. It is contended that the record is incorrect, and the journal entry is sought to be impeached by the affidavits. This, as we have seen, when considering the previous assignment, cannot be done in that mode in this court.

It is insisted that prejudicial error was committed in the failure of the trial judge to inform the jury of the statutory penalty attaching to the offense charged, and denying to counsel for the prisoner permission to comment on the penalty before the jury. It is obvious that both contentions must stand or fall together. If it was the duty of the court to instruct the jury what the penalty was, then it was a fair subject of discussion before the jury, otherwise it was not. Two cases are cited by counsel for the accused to support the propositions advanced, viz., *People v. Cassiano*, 30 Hun [N. Y.], 388, and *Collins v. State*, 5 Tex. App., 38. The last case was decided in a state having a statute which makes it the duty of the jury, in a criminal prosecution, when the prisoner is found guilty, to assess the punishment, in all cases where the same is not absolutely fixed by law, to some particular penalty. (Texas Criminal Code, sec. 626.) We can readily see, under such legislative enactment, that the court should inform the jury of the penalty imposed by law for the offense charged. It would be part of the case. Without being so instructed, the jury could not intelligently and properly determine the punishment. But we have no such law in this state as obtains in Texas, except in capital cases, hence the decision in *Collins v. State* cannot be regarded as a precedent to be followed here. The case decided by the New York court, already cited, sustains the contention of counsel for plaintiff in error; but it is not a well considered opinion, nor is any authority cited in that

state, or elsewhere, to support the doctrine. The judge who prepared the opinion disposes of the question in the following brief language: "We think the information should have been given. In all cases the jury should know the effect of their verdict. While it is proper to instruct them that, when a crime is proven, the extent of the punishment therefor is no sufficient reason why a verdict according to the facts found should not be rendered, yet, as a part of the case, the punishment should be known by the jury." In states where the courts, and not the jury, impose the punishment, the effect or consequences of a verdict of guilty in a criminal case does not concern the jury. They have no right to convict an innocent person because the statutory punishment is light, nor can they acquit one proven guilty of a crime merely because the punishment for the offense prescribed by the law is severe. It follows that where the jury have nothing to do with the punishment prescribed by law for the offense, it is not error for the court to fail to inform them of the statutory penalty. It is discretionary with the trial judge whether he do so or not. Mr. Bishop, in his work on Criminal Procedure (vol. 1, sec. 480), lays down the rule, in effect, that if the punishment is for the court, it need not instruct them as to the penalty, but otherwise if the jury fixes the punishment. (See *Russell v. State*, 57 Ga., 420.)

The next assignment of error is predicated upon the fourth paragraph of the instructions, which reads thus: "If you find from the evidence, beyond a reasonable doubt, that defendant obtained the ring in question temporarily from said Charles Catlin, and that he afterwards, without the knowledge or consent of said Charles Catlin, unlawfully disposed of said ring at a pawn-shop and received money thereon, such an act on the part of the defendant would be a conversion of the property in question to defendant's own use; and if you find, beyond a reasonable doubt, that defendant unlawfully converted said

Ford v. State.

ring to his own use by disposing of the same at a pawnshop, and received money thereon, with intent to steal the same, then defendant would be guilty of larceny of said ring the same as if he had originally feloniously stolen said property from the said Charles Catlin at the time he obtained possession thereof from said Charles Catlin if he did obtain it."

It is argued that this instruction is fatally defective, in that it omitted the element of "felonious taking," and *Mead v. State*, 25 Neb., 444, and *Barnes v. State*, 40 Neb., 545, are cited to support the proposition. Those cases are clearly distinguishable from the one at bar. They were prosecutions for simple larceny, while this is for larceny as bailee. In the decisions referred to the original taking must have been felonious in order to constitute the offense charged, while such is not the case in a prosecution like this. Here the gist of the offense is not the felonious taking of the ring, but the conversion thereof by Ford without the knowledge and consent of the owner, with the intent to steal it. The statute under which the information in this case was filed, section 121b of the Criminal Code, declares "That if any bailee of any money, bank bill, or note, goods, or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny, in the same manner as if the original taking had been felonious." The instruction includes every element of the offense described in the statute.

It is insisted that the instruction is defective for the reason that the word "same" in the sentence, "pawned the ring and received money thereon with intent to steal the same," refers to the word "money" and not to the word "ring." This criticism is without merit. The word "same" refers to "ring," and the jury must have so understood. This is made clear by the portion of the instruction following the sentence quoted above. The jury could not have inferred from the language employed in the in-

struction that they should find the defendant guilty if the evidence showed that he obtained money on the ring with the intent to steal the money. The instruction was not misleading or uncertain.

The foregoing remarks dispose of all the objections urged against the fifth instruction, excepting the one directed to the opening sentence of the instruction, which reads: "Every sane person old enough to be accountable for his acts is presumed to intend to do that which he does do, and is presumed to intend the natural and probable consequences of his voluntary acts, and such presumption becomes conclusive in the absence of evidence to the contrary." It is not contended that this portion of the charge was abstractly incorrect, but it is urged that it was not applicable to the case. In other words, that a specific intent to steal had to be proved,—that is, an intent distinct and separate from the acts done,—and that the rule laid down by the court appertains only where a general intent is sufficient, and not where a specific intent must be shown. It is true the intent to steal the ring had to be proven, but the fact, like any other, could be established by the facts and circumstances detailed by the witnesses. Doubtless, where one who has the lawful possession of the property of another converts the same to his own use, the intent to convert alone might be inferred from the acts, rather than the intent to steal; but whether such inference shall be drawn depends upon the facts of each particular case. The mere proving of the conversion alone, not coupled with any criminalizing circumstance, would be insufficient to establish the intent to steal. The jury could not have understood by the instruction that from the fact of the conversion of the ring they were bound to find that the defendant had a specific intent to steal the same. The instruction, as an entirety, left to the jury to determine the question of intent with which the act was committed from a consideration of all the evidence adduced. The objection to the instruction is overruled.

The next assignment is based upon the sixth instruction, which reads: "The defendant claims that at the time he disposed of the ring in question he was so under the influence of liquor that he was incapable of forming an intent to steal, and for that reason he claims he is not guilty. Drunkenness is no excuse for crime. If the state has proved, beyond a reasonable doubt, that defendant, at and within the county of Douglas and state of Nebraska, at or about the time named in the information, temporarily obtained the property in question from the said Charles Catlin; that while holding the possession of the property he unlawfully and feloniously converted said property to his own use, without the consent of the said Charles Catlin, by disposing of said property at a pawn-shop, with the intent feloniously to permanently appropriate the same to his own use, against the will of said Charles Catlin, then the burden would rest upon the defendant to satisfy you by evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind to steal said property, or raise a reasonable doubt in your minds, after careful weighing and consideration of all the evidence in the case, whether he is guilty, because of such a state of intoxication at the time as not to be able to form an intent to steal. You are to determine this matter from all the evidence in the case." Objection is made to the sentence, "Drunkenness is no excuse for crime." The soundness of this statement cannot be successfully controverted. (3 Rice, Criminal Evidence, sec. 387; *Hoyt v. Utah*, 104 U. S., 631; *Hill v. State*, 42 Neb., 503.) Drunkenness was urged as a defense, and the fact that the court informed the jury that it was no excuse for crime, in no manner tended to belittle the prisoner's defense, as in the brief suggested.

It is strenuously insisted that the sixth paragraph of the charge cast the burden upon the defendant below to show that he was intoxicated when he converted the ring to such

an extent that he was unable to form an intent to steal the property. The instruction is not susceptible of such interpretation. If the defendant succeeded in showing that he was incapacitated at the time, by reason of drunkenness, to form an intent to steal, or if he raised a reasonable doubt in the minds of the jury upon that point, he was entitled to an acquittal. While the language used in the instruction might have been more concisely as well as clearly expressed, yet we are unable to see how it could have misled the jury. It was only necessary that the evidence raise a reasonable doubt of the prisoner's ability to form an intent to steal, to make the defense available, and this idea is sufficiently expressed in the instruction. It did not require that the defendant satisfy the jury of this defense, either by a preponderance of the evidence or beyond a reasonable doubt. If the evidence raised a reasonable doubt as to his ability to form an intent, it was sufficient.

Complaint is made of the eighth instruction, which is in the following language: "If you find the defendant guilty you will determine in your verdict, under the evidence and these instructions, the value of the property, or what it was worth in the market." By this instruction the jury were told to fix the value of the ring in case a verdict of guilty was returned at what it would bring, or was worth, in the market. This, doubtless, was the correct rule. It is true the instruction does not state whether the value was to be determined by a preponderance of the evidence, or beyond a reasonable doubt; but this point was covered by the second instruction, by which the jury were told that the burden was upon the state to establish beyond a reasonable doubt each material averment in the information. The jury, therefore, were fully informed by the court that the value of the property must be established beyond a reasonable doubt. Instructions must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. (*St. Louis v. State*, 8 Neb., 406; *Mur-*

Wilcox v. State.

phy v. State, 15 Neb., 383.) Applying this rule to the case at bar, we are convinced the prisoner's theory of defense was fairly submitted to the jury, and no prejudicial error was committed in refusing the instructions asked by him. The points upon which instructions were asked were fully covered by those given by the court upon its own motion, and it was not error to refuse to repeat them. (*Olive v. State*, 11 Neb., 1.)

It is finally insisted that the verdict was not sustained by the evidence. That the defendant converted the ring to his own use is undisputed, and the careful perusal of the evidence discloses that it was sufficient to warrant the jury in finding that the conversion was felonious and with the intent to steal, and that the accused was sufficiently sober at the time he pawned the property to form such an intent. The judgment is

AFFIRMED.

JEREMIAH C. WILCOX ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. No. 7086.

1. **Contempt: REFUSAL OF WITNESS TO BE SWORN.** A witness in attendance upon a court, who, on being ordered to be sworn or affirmed, contumaciously refuses, is guilty of a contempt of court, and is punishable therefor.
2. ———: ———: **RECORD.** But it is not a contempt of court for a witness to decline merely to be sworn, but he must also refuse to be affirmed, and the record must so disclose.
3. ———: **REFUSAL OF WITNESS TO TESTIFY.** A witness who contumaciously refuses to answer any legal and proper question asked him is guilty of a contempt.
4. ———: **COMMITMENT.** When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment.

ERROR to the district court for Douglas county. Tried below before BLAIR, J.

David Van Etten and J. C. Wilcox, for plaintiffs in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and J. L. Kaley for the state.

NORVAL, C. J.

These proceedings were instituted in this court to review certain orders made by the court below by which Jeremiah C. Wilcox and Sherman Wilcox were adjudged to be in contempt of court. It appears from the record that on the 6th day of June, 1894, one Harry Carton recovered a judgment in the district court of Douglas county against the plaintiff in error, Jeremiah C. Wilcox, in the sum of \$1,237.13, besides costs of suit. An execution was issued upon this judgment on the 25th day of June, 1894, which upon the same day was returned by the sheriff unsatisfied for want of goods and chattels or lands and tenements of the defendant in the county upon which to levy the writ. Thereupon proceedings in aid of execution were instituted before Judge Blair, one of the judges of the district court in and for Douglas county, under the provisions of section 532 *et seq.* of the Code of Civil Procedure, by the filing of the affidavit of one L. F. Crofoot, setting up the recovery of the aforesaid judgment, the issuing of the execution thereon, and the return thereof unsatisfied; that the judgment debtor is interested as a stockholder in certain specified corporations, which interests, together with other property, both real and personal, of which he is possessed, he refuses to disclose or apply towards the satisfaction of said judgment, and that Sherman Wilcox is in possession of the facts with reference to Jeremiah C. Wilcox's ownership of the stock in said corporations, and is a material witness in the proceedings. The district judge made an order com-

manding the said Jeremiah C. Wilcox and Sherman Wilcox to appear before him at a time and place stated therein to answer under oath all questions concerning the interests of Jeremiah C. Wilcox in said corporations, or concerning his other property, as may be propounded to them, and further, that they bring with them the original subscriptions for stock and the stock books of each of said corporations. This order was personally served upon each of the Wilcoxes, and Sherman Wilcox having failed to appear at the time fixed for his appearance, a *capias* was issued to the sheriff commanding him to arrest and bring the said Sherman before the district judge for examination, which writ was accordingly executed. The record shows the following proceedings were had and taken: "Whereupon the said Sherman Wilcox, now being before the court, refused to be sworn and refused to testify. Thereupon the said Sherman Wilcox was adjudged to be in contempt of court," and was committed to the county jail until he should signify his willingness to obey the order of the judge and submit to an examination. The record further discloses that Jeremiah C. Wilcox appeared before Judge Blair, and upon being sworn, refused to give testimony. Thereupon he was adjudged guilty of contempt, and sentenced to pay a fine of \$100, and to stand committed to the jail of the county until such fine is paid and he signify his willingness to answer such questions as might be put to him under the direction of such judge. The foregoing orders adjudging the plaintiffs in error guilty of contempt are before us for review. There is no bill of exceptions in the record, and the question is presented for our consideration whether the findings of the district judge are sufficient to sustain the orders complained of.

It will be observed that Sherman Wilcox was adjudged in contempt of court for declining to be sworn and for refusing to testify, and Jeremiah C. Wilcox was punished as for a contempt for declining to answer questions. Under

the statutes of this state a witness, before giving testimony, is required to take an oath to testify to the truth, the whole truth, and nothing but the truth. The oath is to be administered in the mode most binding upon the conscience of the witness. (Code, sec. 365.) By section 894 of the Code of Civil Procedure it is provided that "whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath shall have the same effect." Section 669 declares: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Fifth—The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory." It requires no argument to show that in this state a witness in court may be sworn by taking the statutory oath, or he may refuse to be sworn on the ground of conscientious scruples, in which case he may affirm. There can be no doubt that where a witness in a court of record, on being ordered to be sworn or affirmed, contumaciously refuses to do either, he is guilty of contempt; but it is not a contempt of court for a witness to decline merely to be sworn by taking the usual oath administered to witnesses, since the statute gives him the right to affirm. The finding of the district judge was insufficient and fatally defective, in that it failed to set forth that Sherman Wilcox refused to be affirmed, as well as declined to be sworn. Presumptions and intentions will not be indulged to support a conviction for contempt of court. (*Hawes v. State*, 46 Neb., 149.)

It remains to be determined whether the plaintiffs in error were rightfully adjudged guilty of contempt for refusing to testify. It cannot be doubted that the refusal of a witness to testify at all may be punished as a contempt of the court or officer of whom his testimony is required, in case the court or officer has jurisdiction of the controversy

McDonald v. Grabow.

or proceeding in which the witness is called upon to give his evidence. The statute, section 360 of the Code of Civil Procedure, provides: "Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify particularly the cause of the arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order." The language quoted is imperative, and requires, when a witness is committed for contempt for refusing to testify, or answer a question asked him, that such question asked and refused to be answered shall be stated in the order of commitment. This was not done in either of the orders under review. So far as this record discloses, no question of any kind was propounded to either of the plaintiffs in error, or that either refused to answer any legal or proper interrogatory. The findings, for this reason, are wholly insufficient upon which to base the convictions. The orders adjudging plaintiffs in error guilty of contempt must be set aside.

REVERSED AND REMANDED.

MARY McDONALD, APPELLANT, V. JOHN GRABOW ET AL., APPELLEES.

FILED NOVEMBER 19, 1895. No. 5765.

Appeal: TRANSCRIPT: AUTHENTICATION. In order to effect an appeal from the district to the supreme court, it is necessary to file with the clerk of this court, within the time prescribed by statute, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional, and the stipulation of the parties or their at-

torneys stating that the transcript contains all the proceedings will not supply the omission of the certificate of the clerk of the trial court.

APPEAL from the district court of Sarpy county. Heard below before SCOTT, J.

J. J. O'Connor, for appellant.

George A. Magney, *con'ra*.

NORVAL, C. J.

The appeal in this case must be dismissed because no transcript of the proceedings, authenticated by the certificate of the clerk of the district court, has ever been filed in this court. In the record is a stipulation signed by the parties to the effect that the transcript contains all the proceedings in the case, but this does not meet the requirements of the statute relating to appeals to the supreme court, Code, section 675, which declares: "The party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment, or decree," etc. The stipulation of the parties does not take the place of the certificate of the clerk of the district court. The requirement of the statute, regarding the authentication of the transcript by the clerk of the district court, is mandatory. (*Moore v. Waterman*, 40 Neb., 498, and cases there cited.) For the reason stated, the appeal cannot be entertained and it is accordingly dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, EX REL. FRANKLIN COUNTY, v.
B. HALL VINCENT.

FILED NOVEMBER 19, 1895. No. 5244.

1. **Fees: CONSTITUTIONAL LAW.** The legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation.
2. ———: ———. The right to fees or salary earned by a public officer under existing laws is property which the legislature is powerless to destroy by a subsequent act altering the emoluments of such office.
3. **Claims Against Counties: RULINGS OF COUNTY BOARD.** The county commissioners, or board of supervisors, in examining and passing upon claims against the county act judicially, and their action in allowing or rejecting claims has the force and effect of a judgment, and is binding upon all parties thereto, unless vacated or reversed by means of appropriate appellate proceedings. (*Heald v. Polk County*, 46 Neb., 28.)

ORIGINAL application for *mandamus* to compel the respondent, as county clerk of Franklin county, to enter upon his fee book and pay into the county treasury the fees received by him for making the tax list for the year 1891. *Writ denied.*

H. Whitmore and Robert Ryan, for relator, cited: *Douglas County v. Timme*, 32 Neb., 272; *State v. Shearer*, 29 Neb., 477.

George W. Sheppard and Cobb & Harvey, contra, cited: *Richardson County v. Mussleman*, 25 Neb., 625; *People v. McCall*, 65 How. Pr. [N. Y.], 443; *People v. Supervisors of Columbia County*, 43 N. Y., 130; *In re Bank of Niagara*, 6 Paige Ch. [N. Y.], 213; *Johnson v. Burrell*, 2 Hill [N. Y.], 238; *Roesink v. Barnett*, 8 Neb., 147; *United States v. Morse*, 3 Story [U. S.], 87.

Post, J.

This is an original application for a writ of *mandamus* to compel the respondent, as clerk of Franklin county, to enter upon the fee book kept by him as such clerk, and to pay over to the treasurer of the county, the sum of \$629.64 paid to and received by him for the making of the tax lists of said county for the year 1891. It is alleged by way of answer that the taxes for the year named were levied on the 17th day of June; that the respondent immediately entered upon the work of preparing the tax lists in accordance with the requirement of sections 80, 81, and 82 of the revenue law (Compiled Statutes, ch. 77, art. 1), and that he "had prior to the 4th day of July done and performed a large part of such duty and labor, the exact amount or near approximate respondent is now unable to state." It is further alleged that fully one-half of the labor of preparing said lists had been performed prior to the 1st day of August following. The other allegations of the answer tender questions of law only, and do not require notice in this connection.

By section 13a, chapter 28, Compiled Statutes, 1887, the county clerk was required to enter upon his fee book and account for all fees except for making tax lists. Said section was by the act approved April 3, 1891, so amended as to read "all fees to be entered on the fee book and accounted for." (Session Laws, 1891, ch. 26.) The amendatory act, in the absence of a special provision upon the subject, took effect three calendar months after the adjournment of the legislature of 1891, or on the 5th day of July, the session having terminated on the 4th day of April of that year. (See *McGinn v. State*, 46 Neb., 427.) It is by section 80 of the revenue law made the duty of the county clerk, after the equalization by the state and county boards, and after the levy of taxes by them, and before the 1st day of October following, to prepare the tax lists in the manner therein prescribed. It was the right, therefore,

if not indeed the duty, of the respondent to undertake the work thus imposed upon him immediately after the levy of the taxes for the year 1891, to-wit, on the 17th day of June. It is admitted by the pleadings, as already intimated, that a considerable part of the labor required in the preparation of the tax lists had been performed at the time the amendment of 1891 became a law. It has been held by this court, in conformity with the decided weight of authority, that the legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation. (*Douglas County v. Timme*, 32 Neb., 272.) It does not follow, however, that the legislature may, under the pretense of altering the compensation of a public officer, confiscate fees or salary previously earned by him. We are referred by the respondent to numerous cases as supporting the proposition that the amendment of 1891 could have no application to such part of the sum in controversy as had been earned by him at the time said act took effect. It is deemed unnecessary to examine the authorities cited, since it cannot be denied that compensation earned under existing laws is property which is within the protection of the bill of rights. It is clear that in no view of the case is the county entitled to recover the full amount paid to the respondent for the preparation of the tax lists; and in the absence of any admission or evidence from which to determine the amount thereof earned subsequent to July 4, the writ must be denied.

Although the allegations of the petition are by no means definite in that regard, the necessary inference therefrom is that the amount alleged to have been received by the respondent for the preparation of the tax lists for 1891 was paid upon a claim therefor presented to, and in due form allowed by, the county board, which brings the case directly within the rule asserted in *Heald v. Polk County*, 46 Neb., 28, viz., that the county commissioners, or board of

Board of Directors of Alfalfa Irrigation District v. Collins.

supervisors, in passing upon claims against the county act judicially, and that its action is binding upon all parties thereto, unless reversed or vacated by means of appropriate appellate proceedings.

WRIT DENIED.

RYAN, C., not sitting.

BOARD OF DIRECTORS OF ALFALFA IRRIGATION DISTRICT, APPELLEE, V. M. S. COLLINS ET AL., APPELLANTS.

FILED NOVEMBER 19, 1895. No. 8060.

1. **Constitutional Law.** The term "due process of law," as employed in section 3, article 1, of the constitution of this state, relates primarily to the remedy for wrongs to persons and property rather than to matters of substantive law.
2. ———: **DISTRICT IRRIGATION LAW: BONDS: TAXATION.** The act approved March 26, 1895, known as the "District Irrigation Law," provides that when bonds are authorized by a vote of any irrigation district, application may be made to the district court of the county in which such district or part thereof is situated for an order confirming and approving the same. At the time set for hearing, and after notice by publication to all concerned, any person interested in said district may appear and resist such application, and the court may examine into and determine all questions pertaining to the organization of the district as well as the regularity of the voting and issuing of such bonds. *Held*, Not to contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the state or federal constitution.
3. **Irrigation Districts: CORPORATIONS: OFFICERS.** Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state.
4. **Statutes: CONSTRUCTION: POWER OF COURTS.** While it is within the province of the judiciary to declare invalid acts evi-

Board of Directors of Alfalfa Irrigation District v. Collins.

dently not designed to subserve public interest, if the subject-matter of legislation be such that there is any doubt of its character, or if by any reasonable construction it can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court.

5. **Constitutionality of District Irrigation Law.** The district irrigation law does not conflict with the constitution by authorizing the taking of property for private use only.
6. **Taxation.** The power of taxation is an attribute of sovereignty having its source in the necessities of organized society, and the limits of its exercise depending, in the absence of express limitations upon such power, upon the exigencies of the public. That power has been committed by the people to the discretion of the legislature, and for an abuse of the trust thus imposed the remedy is by appeal to the people themselves in the manner prescribed by law.
7. ———: **VALIDITY OF DISTRICT IRRIGATION LAW.** The district irrigation law is not unconstitutional on the ground that the power thereby conferred upon districts to levy taxes is without limitation.
8. **Constitutionality of District Irrigation Law.** Nor does said act conflict with the constitution on the ground that the effect thereof is to confer legislative power upon county boards.
9. **Taxation.** The provision of section 1, article 9, of the constitution, for uniform taxation, relates to the revenue required for the general purposes of state and municipal government only, and has no application to taxes or assessments levied for local improvements.
10. **Corporations: SEALS.** Corporations, both municipal and private, may, in the absence of limitations, express or implied, as an incident to their general corporate powers, adopt and use a common seal.
11. **Validity of Tax Deeds: TREASURER'S SEAL.** *Larson v. Dickey*, 39 Neb., 463, and *Dickey v. Paterson*, 45 Neb., 848, distinguished.

APPEAL from the district court of Keith county. Heard below before NEVILLE, J.

T. Fulton Gantt and *J. R. Brotherton*, for appellants, cited: *Cooley*, Constitutional Limitations [4th ed.], sec. 117;

Board of Directors of Alfalfa Irrigation District v. Collins.

Cooley, Taxation [1st ed.], 48; *Harvard v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill., 130; *Cypress Pond Draining Co. v. Hooper*, 2 Met. [Ky.], 350; *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948; *Clother v. Maher*, 15 Neb., 6; *Larson v. Dickey*, 39 Neb., 463.

G. W. Shields, *contra*, cited: *Olmstead v. Camp*, 33 Conn., 532; *Todd v. Austin*, 34 Conn., 84; *Gammell v. Potter*, 6 Ia., 548; *Venard v. Cross*, 8 Kan., 260; *Harding v. Funk*, 8 Kan., 315; *Holyoke v. Lyman*, 15 Wall. [U. S.], 507; *Boston & Roxbury Mill Corporation v. Newman*, 12 Pick. [Mass.], 477; *Hazen v. Essex Co.*, 12 Cush. [Mass.], 475; *Miller v. Troost*, 14 Minn., 282; *Newcomb v. Smith*, 1 Chand. [Wis.], 71; *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis., 351*; *Dean v. Davis*, 51 Cal., 410; *People v. Reclamation District*, 53 Cal., 347; *People v. Williams*, 56 Cal., 647; *Hoke v. Perdue*, 62 Cal., 546; *People v. La Rue*, 67 Cal., 527; *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev., 394; *Tide Water Co. v. Coster*, 18 N. J. Eq., 521; *In re Drainage of Lands*, 35 N. J. Law, 497; *In re Commissioners to Drain*, 39 N. J. Law, 434; *Talbot v. Hudson*, 16 Gray [Mass.], 423; *Rutherford v. Maynes*, 97 Pa. St., 78; *Hagar v. Reclamation District*, 111 U. S., 701; *Mobile County v. Kimball*, 102 U. S., 691; *Louisiana v. Pillsbury*, 105 U. S., 278; *Turlock Irrigation District v. Williams*, 18 Pac. Rep. [Cal.], 379; *Central Irrigation District v. De Lappe*, 21 Pac. Rep. [Cal.], 825; *In re Bonds of Madera Irrigation District*, 28 Pac. Rep. [Cal.], 675; *Board of Directors v. Peterson*, 29 Pac. Rep. [Wash.], 995; *Luz v. Haggin*, 69 Cal., 255; *People v. Salomon*, 51 Ill., 50; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Wynehamer v. People*, 13 N. Y., 378; *Wellington, Petitioner*, 16 Pick. [Mass.], 87; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St., 287; *Powell v. Commonwealth*, 114 Pa. St., 265; *Turner v. Althaus*, 6 Neb., 54; *Jenal v. Green Island Draining Co.*, 12 Neb., 163; *Darst v. Griffin*, 31 Neb., 668; *Dakota*

County v. Cheney, 22 Neb., 437; *Welton v. Dickson*, 38 Neb., 767; *In re House Roll No. 284*, 31 Neb., 506; *Brennan v. City of Weatherford*, 53 Tex., 330; *Porter v. Androscoggin & K. R. Co.*, 37 Me., 349; *Tenney v. East Warren Lumber Co.*, 43 N. H., 343.

POST, J.

This was a proceeding by the appellee before the district court for Keith county under the provisions of section 59 *et seq.* of the act approved March 26, 1895, known as the "District Irrigation Law," seeking a confirmation of steps resulting in the formation of the Alfalfa Irrigation District, and the issuance thereby of certain bonds intended to promote the general purposes of the act. The appellants, who are taxpayers within said district, filed an answer, to which more particular reference will hereafter be made, but which puts in issue substantially all the allegations of the petition. A decree having been entered in accordance with the prayer of the petition, the cause was removed into this court by appeal. The objections urged by the appellants in this court are substantially as follows:

1. The district irrigation law conflicts with section 1, article 3, of the constitution, (1) since it confers on county boards legislative powers in the creation of corporations; (2) because it authorizes the levy by irrigation districts of taxes upon real estate without limitation.

2. Said act conflicts with sections 3 and 21, article 1, of the constitution of this state, and with section 1 of the fourteenth amendment of the constitution of the United States, by authorizing the appropriation of the property of non-residents without due process of law.

3. It conflicts with the constitution of the United States, by authorizing the appropriation of private property without the owner's consent to a mere private use.

4. It violates section 1, article 9, of the constitution of this state, by providing a system of taxation which ex-

cludes from its operation all personal property within the several districts.

5. The bonds in question are invalid, for the reason that they are required to be attested by a seal, whereas the said act makes no provision for the procuring or use by such districts of an official seal.

6. Said district was not legally organized.

7. The issuance of said bonds was not authorized by the requisite vote, and the election mentioned in the petition was accordingly illegal and void.

The first, second, third, and fourth objections challenge the validity of the district irrigation law, and may, for convenience, be considered together. It should, as preliminary to an examination of the subject, be remarked that the act in question is in all essential features copied from the district irrigation law of California, in which state it had, by decisions hereafter cited, received a settled construction long before its adoption by us, and its enactment in this state must be construed as a legislative approval of the interpretation there given it. (*Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb., 798; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb., 884.) It was held in the cases cited that the reclamation of the arid lands of the state is, in a constitutional sense, a public use, to promote which the legislature may authorize the acquiring, by condemnation, of the right of way over private property by irrigating companies. It is not necessary at this time to examine the grounds upon which those cases rest, as the doctrine there asserted is not assailed in the able argument of counsel for appellants. It is said, however, that the district irrigation law was not involved in those cases and that the principle by which they are controlled can have no application to the case at bar. Since we are unable to concede that proposition, an examination of the act mentioned, and some of the cases to which refer-

ence has been made, will not be out of place in this connection.

The act provides for the creation of irrigation districts comprising property susceptible of irrigation from the same source and by means of the same system of works. It requires a petition to be filed with the county board, signed by a majority of the resident freeholders, who are qualified electors, and who own a majority of the whole number of acres of land belonging to resident electors, particularly defining the boundaries of the proposed district. The county board may, on the final hearing of the petition, and after notice thereof to all parties interested, define the boundaries, making such changes thereof as may be deemed proper, but including therein no lands which are not susceptible of irrigation by the same system. The question is then, at a special election, submitted to the electors of the proposed district who are also the owners of real estate therein. Upon the adoption of the proposition, a record thereof is to be filed in the office of the county clerk of each county in which any portion of the land included in said district is situated, and immediately thereafter the county board shall call a special election, at which there shall be chosen a treasurer, an assessor, and three directors. Provision is made for regular meetings of the directors, whose duty it is to manage and conduct the business and affairs of the district, to make and execute all necessary contracts, establish equitable by-laws, rules, and regulations for the distribution and use of water, and to perform all such acts as may be necessary to fully carry out the purposes of the act. Power is also conferred upon said board to acquire, by purchase or condemnation, all lands, waters, and other property necessary for canals, reservoirs, and aqueducts, and to take conveyances therefor. Provision is made for the issuing of the bonds of the district when authorized by a vote of a majority of the electors having the qualifications in said act prescribed, not exceeding the

estimated cost of ditches and other necessary improvements, and for the time and manner of payment thereof. All real estate within the districts is to be listed and assessed by the district assessor, and the board of directors, after equalizing the assessment in the manner therein provided, is required to levy the taxes necessary to pay interest and principal of all bonds previously issued. Upon the issuance of any bonds whether the same shall have been sold or not, the directors of the irrigation districts by which they were authorized may present to the district court of the county in which such district or part thereof is situated a petition praying that all proceedings relating to said bonds may be examined, approved, and confirmed. Upon the hearing of such application, after notice to all persons interested, the court is authorized to examine into and determine the legality of, and approve all of, the proceedings relating to or which may affect the validity of said bonds.

The foregoing synopsis is necessarily incomplete, but it serves to illustrate the general scope and purpose of the measure under consideration.

The validity of this species of legislation was first called in question in *Turlock Irrigation District v. Williams*, 76 Cal., 360, in which it was held, under constitutional provisions substantially similar to ours, that the districts contemplated by the statute of that state are *quasi-public* corporations in the sense that the purpose of their organization is the general public benefit. It is further said that it is not essential to the validity of taxes contemplated by said act "that the method of their assessments and their collection adopted must be assimilated to and follow exactly the mode provided in the constitution for the assessment and collection of taxes for general state purposes." In *Central Irrigation District v. De Lappe*, 79 Cal., 351, the constitutionality of said act was again affirmed, and the rule asserted that proceedings for the formation of irrigation districts should be liberally construed in order to give effect

Board of Directors of Alfalfa Irrigation District v. Collins.

to the purpose of the law. In *Orall v. Poso Irrigation District*, 87 Cal., 140, the same doctrine was asserted. A proceeding like that before us, to establish the validity of bonds voted by an irrigation district, was declared to be an action *in rem*, and the decree therein entered was held a bar to a subsequent action to enjoin the issuing of said bonds on account of irregularity in the organization of the district. Like views are also expressed in the well considered case of *Modesto Irrigation District v. Tregoe*, 88 Cal., 334. And in *Re Bonds of Madera Irrigation District*, 92 Cal., 296, almost every phase of the subject is again examined and the doctrine of the previous cases in that court reasserted without qualification.

We cannot, in this connection, forbear to quote at some length from the very able and convincing opinion of Harrison, J., in the case last cited, viz.: "It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not 'created' until the voters of the district have accepted the terms of the act, the answer is, that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special law, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. * * * Inasmuch as there is no

restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization. * * * In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district. The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire state." The reasoning here employed is reinforced by the later case of

Middle Kittitas Irrigation District v. Peterson, 29 Pac. Rep. [Wash.], 995. It is, as has been observed, quite as applicable to the provisions of our constitution, and leads irresistibly to a conclusion in harmony with that announced in the cases cited. The only case to which we have been referred as authority for the opposing view is *Bradley v. Fullbrook Irrigation District*, 68 Fed. Rep., 948. It was in that case held that the use contemplated by the California statute, to which reference has been made, is, in no proper sense of the term, a public one, and that said act accordingly conflicts with the fourteenth amendment of the United States constitution, prohibiting the several states from depriving any person of life, liberty, or property without due process of law. The opinion of the learned circuit judge in that case, in so far as it arraigns the act involved as a matter of legislative policy, may be accepted as altogether sound, but that it is a sound interpretation of the restrictive feature of the constitution of the United States, or of this state, does not necessarily follow. While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the law-making power respecting the wisdom or necessity thereof. For if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court. (*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, *supra*.)

We are aware that the subject under consideration has by federal tribunals been likened to questions of commercial law, depending for their solution, not upon the decisions of a single state or tribunal, but upon general principles common to all courts. As said in *Olcott v. Supervisors of Fond du Lac County*, 16 Wall. [U. S.], 618, cited in *sup-*

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port of the conclusion announced in *Bradley v. Fallbrook Irrigation District*, "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no state court can conclusively determine for us." We do not, however, understand the court, by what is there said, to call in question the rule by which mere doubts are resolved in favor of the judgment of the legislature. The prohibition against the taking of private property without due process of law is not peculiar to the national constitution, but is a part of the fundamental law of a majority, if not all, of the states. It is worthy of note, too, in this connection, that the foregoing rule was firmly established long prior to the adoption of the fourteenth amendment. (2 Kent's Commentaries, p. 340; *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. [N. Y.], 73; *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, 518, and cases cited.) The reasonable inference is that the restriction therein upon the powers of the states relating to private property was intended to harmonize the national bill of rights with the provisions of the several state constitutions, rather than to introduce a new and distinct principle or rule of construction. It is doubtful, indeed, if that enactment had the effect to enlarge the rights of property secured by the common law, since, as shown in *Davidson v. New Orleans*, 96 U. S., 97, the term "due process of law" means no more than the "law of the land," as employed in Magna Charta. (See, also, *Parsons v. Russell*, 11 Mich., 129; *Bonning v. Taylor*, 24 Pa. St., 292; *Greene v. Briggs*, 1 Curt. [U. S.], 311.)

In the opinion of Mr. Justice Miller in *Davidson v. New Orleans*, *supra*, is found an exceedingly comprehensive discussion of the subject, concluding as follows: "There is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution by the gradual process of judicial inclusion and

exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

* * * As contributing to some extent to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us: That whenever, by the laws of a state, or by state authority, a tax, assessment, or servitude, or other burden, is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." That case arose under the provisions of a statute of Louisiana authorizing the assessment of property within drainage districts for the purpose of reclaiming overflowed lands. Before such assessments could become effectual they are required to be filed in the proper court, and personal notice given all owners known and within reach of process, and service by publication as to such as are unknown or not within the jurisdiction of the court. An order of confirmation was denied by the lower court, which judgment was reversed on appeal to the supreme court of the state, and the judgment last mentioned was affirmed on error, by the supreme court of the United States. In *Pearson v. Yewdall*, 95 U.S., 294, it is said by Waite, C. J., referring to a Pennsylvania statute of the same general character: "In the act of the general assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction upon appeal to the highest court of the state. This is due process of law within the

meaning of that term as used in the federal constitution." The question was again directly presented in *Hagar v. Reclamation District*, 111 U. S., 701, which arose under a California statute for the reclamation, by districts, of swamp and overflowed, salt, marsh, and tide lands by means of assessments upon property thereby benefited, in which Mr. Justice Field uses this language: "If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice, and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed." And the same doctrine is reasserted and emphasized by Mr. Justice Gray in *Wurts v. Hoagland*, 114 U. S., 606. (See in this connection, also, *Spencer v. Merchant*, 125 U. S., 345; *Paulsen v. City of Portland*, 149 U. S., 30; *Dean v. Davis*, 51 Cal., 410; *People v. Reclamation District*, 53 Cal., 348; *Turlock Irrigation District v. Williams*, *Central Irrigation District v. De Lappe*, *In re Bonds of Madera Irrigation District*, *supra*.) It is said in the case last cited that "his [the complainant's] property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment thereon becomes final;" citing *Gilmore v. Hentig*, 33 Kan., 170, *Davies v. City of Los Angeles*, 86 Cal., 37, and *Hagar v. Reclamation District*, *supra*. And in *Turlock Irrigation District v. Williams* the court, referring to the analogy between irrigating districts and districts organized for the reclamation of swamp and overflowed lands, say: "The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general pur-

poses of state government, by reason of too much water flowing over, or standing upon, or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, much of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands."

The conclusions we reach from an examination of the foregoing authorities are, first, that the term "due process of law" relates primarily to the remedy or means of redress where property rights are invaded rather than to matters of substantive law, and that the provision of our statute for a hearing, upon notice, of all questions pertaining to the organization of irrigation districts and the imposition by them of taxes and assessments fully satisfies the requirements of the state and federal constitution; second, the end and purpose of said act is, in a constitutional sense, public, and, therefore, resting in the wisdom and discretion of the legislature. The reasoning, based upon the decision in *Bradley v. Fallbrook Irrigation District*, must accordingly be rejected.

The objection to said act on the ground that it authorizes the creation by county boards of municipal corporations in violation of section 1, article 3, of the constitution, is fully met by the California cases cited holding that irrigation districts are public and not, strictly speaking, municipal corporations, and that their officers are agents of the state.

To the proposition that the authority conferred upon irrigation districts to levy taxes without limitation upon the property within their boundaries, is an invasion of the provisions of the state constitution, it may be answered: First—That the power of taxation is an attribute of sovereignty having its source in the necessities of organized society. That power has, by the people, been committed to the discretion of the legislature, and the limits within which it

may be exercised depend, in the absence of express limitation upon such power, upon the exigencies of the public, and for an abuse of the trust thus imposed the remedy is an appeal to the people themselves in the manner ordained by the constitution. Second—The power of taxation so conferred is not, as counsel assume, unlimited, but is restricted to revenue sufficient to meet the obligations voluntarily assumed by the taxpayers themselves. Third—Although ample provision is made for resisting the issuance of bonds, by taxpayers and others interested, the record contains no suggestion of an abuse in this instance of the taxing power; nor does said act conflict with section 1, article 9, of the constitution, requiring taxation to be equal and uniform; that provision relates to the revenue required for the general purpose of government, state and municipal, and has no application to taxes or assessments levied for local improvements. (*City of Sterling v. Galt*, 117 Ill., 11; *Davis v. City of Litchfield*, 145 Ill., 313; *Reinken v. Fuehring*, 130 Ind., 382; *City of Chester v. Black*, 132 Pa. St., 568; *City of St. Joseph v. Owen*, 110 Mo., 445; *City of Denver v. Knowles*, 17 Colo., 204.)

The only other objection which calls for notice is that by which the validity of the bonds is assailed on the ground that the act under consideration does not expressly authorize the procuring of a seal by irrigation districts. That contention is based upon the ruling of this court in *Larson v. Dickey*, 39 Neb., 463, and *Dickey v. Paterson*, 45 Neb., 848, that inasmuch as no provision is made by law for the use by county treasurers of an official seal, there exists under the present revenue law no authority for the execution by them of valid tax deeds. Our first impression, it must be confessed, was strongly in favor of the soundness of that argument; but upon reflection we are satisfied that the cases cited rest upon principles entirely different from that which must control in this. By reference to *Larson v. Dickey* it will be observed that the provision there under

consideration was section 127 of the revenue law (Compiled Statutes, ch. 77, art. 1), requiring tax deeds to be executed by the treasurer "under the official seal of his office," substantially in accordance with the form therein prescribed, and which concludes as follows: "Given under my hand and the seal of our court this — day of —, A. D. 18—." It is shown in that case that the section mentioned was copied from section 221 of the revenue law of Illinois. By statute of that state the sale of lands for delinquent taxes was made under decree of the county court, a court of record, in a proceeding instituted by the county treasurer, the section above mentioned requiring all deeds therefor to be executed by the clerk under the seal of the court. What was there held, in effect, is that the history of section 127 emphasizes the oft-asserted rule that provisions intended to divest persons of title to property, in the exercise of the taxing power, should be strictly construed. The cause before us, on the other hand, involves the mere contractual obligation of the district named and not calling for the application of the strict rule of construction recognized in the cases mentioned. It may with safety be asserted that in the absence of limitation, express or implied, corporations, both private and municipal, may, as an incident to their general corporate powers, adopt and use a common seal. (1 Dillon, Municipal Corporations [4th ed.], sec. 190; 4 Thompson, Law of Corporations, secs. 5044, 5045; 1 Beach, Private Corporations, sec. 376.)

It follows that the decree of the district court is right and must be

AFFIRMED.

BARNEY MCGINN V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. No. 6854.

1. **Constitutional Law: CALENDAR MONTH.** The term "calendar month" is used in section 24, article 3, of the constitution in the sense in which it was understood prior to the adoption of that instrument.
2. **Calendar Month.** The term "calendar month," whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.
3. **Statutes: TIME.** The provision of section 895 of the Code of Civil Procedure, for the exclusion of the first day in computing the time within which an act is to be done, was intended to establish a uniform rule, applicable alike to the construction of statutes and to matters of practice.
4. ———: **TIME OF GOING INTO EFFECT: PENALTY FOR MURDER.** The penalty for murder in the first degree was, by section 3 of the Criminal Code, as originally adopted, death by hanging. By an act approved April 8, 1893, passed without an emergency clause, said section was so amended as to provide that the penalty for the crime therein denounced shall be death by hanging, or imprisonment for life, in the discretion of the jury. The legislature of 1893, having adjourned on the 8th day of April of that year, *held*, that said amendment took effect on the 9th day of July following.
5. **Criminal Law: CONVICTION: REVIEW: FORMER JEOPARDY: WAIVER.** When the defendant in a criminal prosecution is adjudged guilty of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy.
6. ———: **SENTENCE: IMPRISONMENT.** While the practice of confining persons convicted of capital offenses from the date of sentence until the day of execution has prevailed from time imme-

McGinn v. State.

morial, such confinement is not a part of the penalty, although a necessary incident thereof, and the power of the court in that regard does not rest upon any positive provision of statute.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

The facts are stated in the opinion.

Mahoney, Minahan & Smyth and *Estelle & Hoepfner*, for plaintiff in error :

If the plaintiff in error is guilty of murder as charged in the information, the crime was committed July 29, 1893, and he should have been tried under the laws then in force. By chapter 44, Session Laws, 1893, the jury, in finding a conviction of murder in the first degree, must fix the penalty and say by their verdict whether the defendant shall suffer death or imprisonment for life. This statute was approved April 8, 1893, and the legislature adjourned the same day. The court, in refusing to permit the jury to fix the penalty, committed an error. The law formerly in force prescribed the death penalty as the only punishment for murder in the first degree, and a verdict thereunder finding the accused guilty is illegal and will not support a sentence, where the alleged crime was committed after the new law went into effect. Under the constitutional provision that no act shall take effect until three calendar months after the adjournment of the legislature, the act requiring the jury to fix the penalty for murder in the first degree took effect July 9, 1893, before the alleged crime had been committed. (Constitution, sec. 24, art. 3; Session Laws, 1893, ch. 44; *Cooley*, Constitutional Limitations [6th ed.], 187; *Glore v. Hare*, 4 Neb., 131; *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233; *Lacon v. Hooper*, 6 T. R. [Eng.], 224; *Bishop*, Contracts, sec. 1339; *Ellis' Case*, 8 N. J. Law, 286; *Loring v. Halling*, 15 Johns. [N. Y.], 119; *Stackhouse v. Halsey*, 3 Johns. Ch. [N. Y.],

74; *Redmond v. Glover*, Dud. [Ga.], 107; *Gross v. Fowler* 21 Cal., 393; *Savings & Loan Society v. Thompson*, 32 Cal., 347; *Beacon v. State*, 22 Fla., 46; *Brown v. Williams*, 34 Neb., 376; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind., 275; *Snyder v. Warren*, 2 Cow. [N. Y.], 518; *Parsons v. Chamberlin*, 4 Wend. [N. Y.], 512; *French v. English*, 7 Neb., 124; *Roesink v. Barnett*, 8 Neb., 146; *Guaranty Trust Co. v. Green Cove S. & M. R. Co.*, 139 U. S., 137; *People v. Ulrich*, 2 Abb. Pr. [N. Y.], 28; *Commonwealth v. Maxwell*, 27 Pa. St., 444; *Lester v. Garland*, 15 Ves. [Eng.], 248; *Hardy v. Ryle*, 9 Bar. Cr. [Eng.], 603; *Castle v. Burditt*, 3 T. R. [Eng.], 623; *Young v. Higgon*, 6 M. & W. [Eng.], 49; *Watson v. Pears*, 2 Campb. [Eng.], 294; *South Staffordshire Tramway Co. v. Sickness & Accident Assurance Association*, 1 Q. B., 1891 [Eng.], 402; *Radcliffe v. Bartholomew*, 1 Q. B., 1892 [Eng.], 161.)

On December 29, 1893, the court pronounced sentence on plaintiff in error, by the terms of which he was to be confined in the county jail in solitary confinement until April 6, 1894, and then hanged. Under that sentence he was taken to the jail and kept in solitary confinement until the following day, when he was brought into court, the sentence vacated and a new sentence pronounced, fixing his execution at a later date, and his imprisonment at solitary confinement for a different period. The second sentence was absolutely without authority, for the reason that the punishment prescribed by the first being partly borne, the power of the court over it was exhausted. Under the constitutional guaranty that a man shall not be twice put in jeopardy for the same offense, the court had no power or authority to impose another and different sentence. (*In re Fuller*, 34 Neb., 581; *People v. Kelly*, 44 N. W. Rep. [Mich.], 615; *People v. Meservey*, 42 N. W. Rep. [Mich.], 1133; *Ex parte Lange*, 18 Wall. [U. S.], 163; *In re Jones*, 35 Neb., 499; *State v. Gray*, 37 N. J. Law, 368.)

In support of the argument that the first sentence is er-

McGinn v. State.

roneous and that the plaintiff in error should be discharged, reference was made to the following authorities: Criminal Code, sec. 503; *Rex v. Ellis*, 5 Barn. & C. [Eng.], 395; *Rex v. Bourne*, 7 Ad. & El. [Eng.], 58; *Shepherd v. Commonwealth*, 2 Met. [Mass.], 419; *Stevens v. Commonwealth*, 4 Met. [Mass.], 360; *Christian v. Commonwealth*, 5 Met. [Mass.], 530; *People v. Taylor*, 3 Denio [N. Y.], 91; *Daniels v. Commonwealth*, 7 Pa. St., 371; *Beale v. Commonwealth*, 25 Pa. St., 11; *Commonwealth v. Ellis*, 11 Mass., 465; *Sheperd v. People*, 25 N. Y., 406; *State v. Gray*, 37 N. J. Law, 368; *McDonald v. State*, 45 Md., 90; *Benedict v. State*, 12 Wis., 313; *Peglow v. State*, 12 Wis., 534; *Williams v. State*, 18 O. St., 46; *Picket v. State*, 22 O. St., 405; *State v. Shuchardt*, 18 Neb., 454; *Conklin v. State*, 25 Neb., 784; *Jackson v. State*, 15 So. Rep. [Ala.], 351.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state:

Prior to the act approved April 8, 1893, the penalty for murder in the first degree was death. (Criminal Code, 1891, sec. 3.)

By the provisions of the act approved April 8, 1893, the legislature amended section 3 of the Criminal Code so that the penalty should be death or imprisonment for life, in the discretion of the jury. (Criminal Code, 1893, sec. 3.)

Section 24, article 3, of the constitution provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency." The precise question presented is a construction of the meaning of the term, "three calendar months." The construction as applied to written constitutions should give effect to the intent of the people adopting it, so as to give meaning if possible to every word and phrase. (Cooley, Constitutional Law, 72; *State v. Bacon*, 6 Neb. 297.)

In 1850 the parliament of England defined the word "month" to mean calendar month. (13 and 14 Vic., c. 21.)

"Calendar month" has been defined one of the months of the year as enumerated in the calendar, without reference to the number of days it may contain. (Black, Law Dictionary; Abbott, Law Dictionary; Webster, Dictionary; 13 Am. & Eng. Ency. Law, 712; Encyclopædia Britannica.)

"Calendar month" is one of the divisions of time as January, February, March. (Rapelje, Dictionary; Sedgwick, Statutory and Constitutional Law, 358, 372; *Roe-sink v. Barnett*, 8 Neb., 146; *Opinion of the Judges*, 5 Neb., 566; *State v. Babcock*, 22 Neb., 37.)

A week is a definite period of time, commencing on Sunday and ending on Saturday. (*Steinbe v. Bell*, 12 Abb. Pr., n. s. [N. Y.], 172; *State v. Yellow Jacket Silver Mining Co.*, 5 Nev., 430.)

For a review of the authorities relating to the meaning of the word "month," see *Guaranty Trust & Safe Deposit Co. v. Buddington*, 12 L. R. A. [Fla.], 771.

In 1891 the term "three calendar months" was construed adversely to the contention of plaintiff in error by the attorney general. His construction has since been followed by the department of state. The construction given to a statute by those charged with the duty of executing it should not be overruled without strong reason. (*United States v. Moore*, 95 U. S., 760; *Brown v. United States*, 113 U. S., 568; *Hahn v. United States*, 107 U. S., 402; *Cooper Mfg. Co. v. Ferguson*, 113 U. S., 727; *Stewart v. Laird*, 1 Cranch [U. S.], 299; *Peabody v. Stark*, 16 Wall. [U. S.], 240; *Ellis v. Glaser*, 61 N. W. Rep. [Mich.], 649; *Westbrook v. Miller*, 56 Mich., 151; *Malonny v. Mahar*, 1 Mich., 26; *Britton v. Ferry*, 14 Mich., 53; *Continental Improvement Co. v. Phelps*, 47 Mich., 299; *Pease v. Peck*, 18 How. [U. S.], 565; *Coutant v. People*, 11 Wend. [N. Y.], 511; *Jackson v. Washington County*, 34 Neb., 688; *State v. Smith*, 35 Neb., 24.)

Section 503, Criminal Code, provides that at least one hundred days shall intervene between the sentence and the day of execution. Where an error has been made in computing this time, the court has a right to set aside the judgment and resentence the prisoner. The imprisonment pending the date of execution, though solitary confinement, is no part of the sentence of the law, but merely incidental to the keeping of the prisoner. In case a mistake in the time has been made the court may set aside the sentence and resentence the prisoner. (*State v. Shea*, 95 Mo., 85; *Lacy v. State*, 15 Wis., 15; *State v. Shaw*, 23 Ia., 316; *State v. Nicholson*, 14 La. Ann., 798; *Daniels v. Commonwealth*, 7 Pa. St., 371; *King v. Kenworthy*, 1 Barn. & C. [Eng.], 711; *Benedict v. State*, 12 Wis., 348; *Beal v. Commonwealth*, 25 Pa. St., 11; *People v. Riley*, 48 Cal., 549; *State v. Child*, 42 Kan., 611; *State v. Redman*, 17 Ia., 329; *State v. Knouse*, 33 Ia., 365; *State v. Tweedy*, 11 Ia., 350; *People v. Howell*, 28 Cal., 456; *Sutcliffe v. State*, 18 O., 469; *Dodge v. People*, 4 Neb., 220; *Bohanan v. State*, 18 Neb., 57.)

Judgment for a longer term than that authorized by law may be corrected and affirmed where the record discloses no other error. (*Vaughan v. State*, 83 Ala., 55; *Webster v. Commonwealth*, 5 Cush. [Mass.], 407; *Chitty*, Criminal Law, 722; *Dodge v. People*, 4 Neb., 226; *In re Jones*, 35 Neb., 499; *State v. Treszevant*, 20 S. Car., 363; *State v. Hoyt*, 47 Conn., 542.)

In *Kinsler v. Territory*, 1 Wyo. Ter., 112, the prisoner was sentenced to be hanged. On the day following the sentence the court discovered an informality therein, vacated the sentence, and pronounced a new one. It was held that there was no error in the proceedings.

The court has a right to vacate or modify its judgment in a criminal as well as in a civil case during the term; and the plea of being once in jeopardy will not avail defendant upon the theory that he has served part of the punishment

imposed upon him. (2 Coke, Littleton, p. 260a; *Regina v. Fitzgerald*, 1 Salk. [Eng.], 401; *Turner v. Barnaby*, 2 Salk. [Eng.], 567*; *King v. Price*, 6 East [Eng.], 327; *Darling v. Gurney*, 2 Dowl. [Eng.], 101; *Tilden v. Johnson*, 6 Cush. [Mass.], 354; *Fay v. Wenzell*, 8 Cush. [Mass.], 315; *Stickney v. Davis*, 17 Pick. [Mass.], 169; Wharton, Criminal Pleading & Practice, sec. 913; *Commonwealth v. Foster*, 122 Mass., 323; *Brown v. Rice*, 57 Me., 57; *Jobe v. State*, 28 Ga., 235; *Lee v. State*, 32 O. St., 115; *Basset v. United States*, 9 Wall. [U. S.], 38; *Miller v. Finkle*, 1 Park. Cr. Cas. [N. Y.], 374; *Wright v. State*, 5 Ind., 527.)

Where the verdict is insufficient and does not properly respond to the indictment, and the defendant appeals, the judgment may be reversed and the cause remanded for a new trial. (*Marshall v. Commonwealth*, 5 Gratt. [Va.], 663; *State v. Moran*, 7 Ia., 236; *Wilson v. State*, 20 O., 26; *State v. Sutton*, 4 Gill [Md.], 494; *People v. Olcott*, 2 Johns. Cas. [N. Y.], 301; *State v. Callendine*, 8 Ia., 288; *Dodge v. People*, 4 Neb., 220; *State v. Knouse*, 33 Ia., 365; *State v. Redman*, 17 Ia., 329.)

Where there is error in the record the plaintiff in error should not be discharged but the case should be remanded for trial. (*State v. Schuchardt*, 18 Neb., 454; *Conklin v. State*, 25 Neb., 784; *Jackson v. State*, 15 So. Rep. [Ala.], 351.)

The instructions of the court correctly define malice. (*Milton v. State*, 6 Neb., 143; *Carr v. State*, 23 Neb., 749.)

The weight to be given evidence is a question entirely for the jury to determine. (*Seling v. State*, 18 Neb., 548; *Whitman v. State*, 42 Neb., 841; *Palmer v. People*, 4 Neb., 68; *Monroe v. State*, 10 Neb., 448; Bishop, New Criminal Procedure, sec. 1274.)

It is incompetent to show that the character and disposition of the deceased was quarrelsome where there was no evidence to establish a quarrel at the time of the homicide. (*Keener v. State*, 18 Ga., 194; *Quesenberry v. State*, 3 Stew.

McGinn v. State.

& Port. [Ala.], 309; *Doyal v. State*, 70 Ga., 134; *Gardner v. State*, 90 Ga., 312; Wharton, Criminal Evidence, sec. 84; *People v. Lamb*, 2 Keyes [N. Y.], 360.)

It is within the discretion of the court to limit the number of witnesses upon the question of the character of the prisoner. (*Mathews v. State*, 19 Neb., 330; 1 Greenleaf, Evidence, sec. 65; Bishop, New Criminal Procedure, sec. 1136; *Mergentheim v. State*, 107 Ind., 567; *State v. Whitton*, 68 Mo., 91; *Bunnell v. Butler*, 23 Conn., 65; *Commonwealth v. Webster*, 5 Cush. [Mass.], 324; *Wesley v. State*, 37 Miss., 327; *People v. Sweeney*, 133 N. Y., 609; *Coleman v. State*, 59 Miss., 490; *Jackson v. State*, 76 Ga., 562.)

Post, J.

The plaintiff in error Barney McGinn was at the September, 1893, term of the district court for Douglas county adjudged guilty of the crime of murder in the first degree, which judgment has been removed into this court for review by means of a petition in error, to which further reference will hereafter be made. The prisoner is by the information charged with feloniously and maliciously wounding, with intent to kill, one Edward McKenna on the 29th day of July, 1893, from which he, the said McKenna, died two days later, on the 31st day of July. It is unnecessary to examine at length the evidence adduced in support of the allegations of the information. It is sufficient for the purpose of this investigation that the dates of the assault and the death of the deceased were proved as charged by the state. The jury, at the close of the trial, returned a general verdict of murder in the first degree without assessing the penalty therefor, to which exception was taken both by way of motion for a new trial and in arrest of judgment, and which suggests the first questions presented for our consideration.

Prior to the act approved April 8, 1893, entitled "An

act to amend section No. three (3) of the Criminal Code," etc. (Session Laws, 1893, p. 385, ch. 44), the only penalty for murder in the first degree was death by hanging; but by section 1 of the act above mentioned section 3 of the Criminal Code was so amended as to read thus: "And upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." By section 2 of said act the original section is repealed with a saving clause in the following language: "*Provided, however,* That such repeal shall not be construed to apply to any offenses committed prior to the taking effect of this act, nor shall the same affect any convictions or prosecutions held under said original section." (Session Laws, 1893, p. 386, sec. 2, ch. 44.) The contention of counsel for the prisoner is that the act of 1893 took effect previous to the date charged in the information; hence the district court should have required the jury to fix the penalty, and that it accordingly erred in receiving the verdict over their objections. The constitutional provision which bears upon the subject is found in section 24 of article 3, as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct." The twenty-third session of the legislature adjourned on the day the act in question was approved, to-wit, April 8, 1893; therefore the precise question presented is, when did the constitutional period of three calendar months after the adjournment of that session terminate? The term "month" at common law, whether employed in statutes or contracts, unless a different meaning was apparent from the context, was held to mean a lunar month of twenty-eight days, except in ecclesiastical affairs, and as applicable to commercial paper. (Chase's Blackstone, Commentaries, 141*; Bishop,

McGinn v. State.

Contracts, sec. 1339; *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233; *Lacon v. Hooper*, 6 T. R. [Eng.], 224; *Churchill v. Merchants Bank*, 19 Pick. [Mass.], 532; *Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co.*, 139 U.S. 137.) In this country many of the earlier cases follow the rule of the common law. (*Vide Ellis' Case*, 8 N. J. Law, 286; *Loring v. Halling*, 15 Johns. [N. Y.], 19; *Stackhouse v. Halsey*, 3 Johns. Ch. [N. Y.], 74; *Redmond v. Glover*, Dud. [Ga.], 107.) Later cases have, as a rule, construed the word "month," when it does not appear to have been used in a different sense, to mean a calendar month. (*Glore v. Hare*, 4 Neb., 132; *Brown v. Williams*, 34 Neb., 376, and cases cited.) In order to avoid the confusion arising from conflicting constructions of the term, thirty-five states and territories have by legislative enactment declared the term "month," when used without qualification, to mean a calendar month; and in England the common law rule was abolished by statute in 1850. (13 and 14 Vic., c. 21.)

It is said by counsel for the prisoner, referring to the facts of this case, that "the authorities, without exception, support our contention that three calendar months should be computed as commencing to run on the 9th day of April and terminating on the 8th day of July," and as that proposition presents the issue to be determined, we will proceed to examine some of the cases cited as bearing upon the subject. In *Glore v. Hare*, *supra*, it was held that an appeal taken on the 22d day of August from a judgment rendered February 21 is not within the six months prescribed by the act governing appeals to this court. In *Brown v. Williams*, *supra*, a note executed on the 2d day of January was held within the exception contained in section 44 (Compiled Statutes, ch. 6) of the assignment law, being a debt created within nine calendar months previous to a general assignment made on the 2d day of October following. In *Snyder v. Warren*, 2 Cow. [N. Y.], 518, fif-

teen calendar months were computed from August 15, 1822, to November 15, 1823. In *McGuire v. Ulrich*, 2 Abb. Pr. [N. Y.], 28, the statute required one month's notice to quit before suit brought. The notice was given April 18, and it was held that a calendar month had intervened before the commencement of the action, to-wit, May 25. In *Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co.*, *supra*, the first publication of notice was made August 9, the answer day named being December 1, following. After computing the time at 114 days, the court say the time is "more than four lunar months, but eight days less than four calendar months."

We now come to a class of cases having a more direct bearing upon the question at issue. In *Commonwealth v. Maxwell*, 3 Casey [Pa.], 444, the statute provided that in case of vacancy in the office of judge of common pleas, a successor should be chosen "at the first general election which shall happen more than three calendar months after the vacancy shall occur." The presiding judge died July 15, 1856, and the general election for that year occurred October 14. It was held that the statutory period had not intervened, and that the respondent, who was chosen at the election held on the day last mentioned, was not entitled to the office. In *Minard v. Burtis*, 83 Wis., 267, we observe this language: "It is also said that the notice was not given one calendar month before the action was commenced; that, having been given April 4, it would not be complete until June 1. We cannot adopt this view. If given the proper number of days before action brought, as contained in the calendar month in which it was given, as in this case, it was sufficient." The leading case of *Lester v. Garland*, 15 Ves. Ch. [Eng.], 248, arose under the will of Sir John Lester, providing that the testator's sister, Sarah Pointer, should within six calendar months after his death give security that she would not at any time intermarry with A, or that in case she did so inter-

marry, that she would within six calendar months thereafter pay certain bequests therein made. The testator died January 12 and the security given July 12 was held to satisfy the requirements of the will, Grant, M. R., saying: "The question is whether the day of Sir John Lester's death is to be included in the six months or to be excluded. If the day is included she did not, if it is excluded she did, give the required security before the end of the last day of the six months; and therefore did comply sufficiently with the conditions." *Hardy v. Ryle*, 9 Barn. & C. [Eng.], 603, was an action against a justice of the peace for illegally detaining the plaintiff after the expiration of his term of imprisonment. The defendant relied upon a statute of limitations which required the action to be brought "within six calendar months after the act committed." The court, after a review of the authorities, say: "The question * * * depends upon this: whether the 14th day of December, the last day of the plaintiff's imprisonment, is to be included or excluded. * * * If it is to be included, the action was not commenced in time; if it is to be excluded, it was." *South Stratfordshire Tramway Co. v. Sickness & Accident Assurance Association*, 1 Q. B. Div., 1891 [Eng.], 402, was an action on a policy of insurance for twelve calendar months, from November 24, 1888. It is said that November 25, 1887, was the first and November 24, 1888, the last day covered by the policy. And to the same effect are *Young v. Higgon*, 6 M. & W. [Eng.], 49; *Watson v. Pears*, 2 Campb. [Eng.], 294; *Ratcliffe v. Bartholomew*, 1 Q. B. Div., 1892 [Eng.], 161; *Gross v. Fowler*, 21 Cal., 393; *Savings & Loan Society v. Thompson*, 32 Cal., 347. But perhaps the most satisfactory of reported cases is *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233, which was an action against the governor of the Middlesex House of Correction for false imprisonment. It appears that the plaintiff was on the 31st day of October sentenced to imprisonment for the period of one calendar

month, and to the further term of fourteen days, to commence on the expiration of the first sentence. The decision turned upon the question when the first sentence terminated, and Lord Denman, after an exhaustive examination of the subject, concludes as follows: "On the whole, I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month is to be held to begin to run from the first moment of that day and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as in the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day." The other judges, Cotton, Bramwell, and Brett, concur in separate opinions, the latter using the following language: "I am of opinion that the term a 'calendar month' is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that in computing time by calendar months the time must be reckoned by looking at the calendar and not by counting days, and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one." It is true the precise question was not presented in every case cited, as the same result would in some instances have been reached by extending the period to the end of the month; but they are nevertheless instructive as tending to sustain the assertion of counsel that in no case, except in *Minard v. Burtis*, *supra*, was the rule applied by the district court contended for. The natural and necessary deduction from the authorities above cited is that the term "calendar month," as used in the constitution, had, prior to the adoption of that instrument in 1875, received a definite interpretation, and is to be com-

puted not by counting days but by looking at the calendar, and terminates with the day numerically corresponding to the day of its commencement, less one, in the following month; and such is evidently the sense in which it is employed in the constitution.

The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that “the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last,” was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice. (*Monell v. Terwilliger*, 8 Neb., 360; *McGavock v. Pollack*, 13 Neb., 535; *Spencer v. Haug*, 45 Minn., 231.) It follows that the period of three calendar months after the adjournment of the legislature of 1893 terminated at midnight of the 8th day of July of that year. It follows, too, that the act amendatory of the Criminal Code relating to the penalty for murder in the first degree was the law of the state on the 29th day of July and should have governed in the trial of this cause. The attorney general, however, relies upon a practical construction of the provision under consideration adverse to the view above stated. That contention has for its basis the opinion of Hon. George H. Hastings, attorney general, in response to an inquiry addressed to him by the secretary of state on the 29th day of April, 1891. We have examined with care the opinion referred to, but are unable to accept the conclusion of the learned author, for reasons already appearing. A practical exposition of a constitutional provision by the officers charged with its execution is, as said by us in *State v. Holcomb*, 46 Neb., 88, entitled to great weight, and will, in case of doubt or ambiguity,

especially when long acquiesced in, generally be adopted by the courts; but that rule can have no application to the case at bar. There is not alone an absence of evidence tending to prove that the construction of the attorney general was acquiesced in by the executive officers or the people of the state, but it is a fact, verified by the records of this court and of which we are required to take notice, that the question has, ever since the date of the opinion mentioned, been the subject of judicial controversy.

Of the many questions presented during the able and instructive arguments with which we have been favored in this case it is necessary to notice two only in addition to those already examined, and which are both included in the proposition that it is our duty to discharge the plaintiff in error instead of remanding the cause for trial *de novo*. It is asserted by counsel that the plaintiff has been once in jeopardy within the meaning of the bill of rights, and that the trial then had is a bar to further prosecution for the crime charged. If the question were an open one to be determined by the application of fundamental principles, the argument of counsel could not be lightly disregarded. Indeed, we can conceive of no course of reasoning which does not lead logically to the conclusion contended for. As said by Mr. Bishop (1 Bishop, Criminal Law, 1044): "The court is the power that brings the jeopardy upon him [the prisoner], and when the constitution declares that this power shall not put him in jeopardy twice, it is mockery to say that it may bring him into as many jeopardies as it will, provided it violates the law each time." But the author, at sections 998 and 999 of the same volume, admits the contrary to be the firmly established rule. To attempt an examination of the cases holding that the accused, in a criminal prosecution, by procuring a reversal of the judgment of conviction, waives his right to object to a second trial on the ground that he has been once put in jeopardy, would be a work of supererogation. It is sufficient that

the question has been definitely determined by this court in *Bohanan v. State*, 18 Neb., 57. (See, also, *United States v. Harman*, 68 Fed. Rep., 472.)

The other contention, that the prisoner should be discharged, is based upon the following facts: On the 29th day of December, 1893, the district court, on overruling the motion for a new trial, pronounced its judgment by which the prisoner was to be executed on the 6th day of April following, and in the meantime remain in solitary confinement in the jail of Douglas county. On the next day, to-wit, December 30, he was again brought into court and an order made setting aside the judgment previously entered and a second sentence pronounced by which April 13, 1894, was named as the day of execution. The second sentence, like the first, provided that the prisoner should, from the date thereof until the day of his execution, be confined in the jail of Douglas county. It is argued that the second sentence is not irregular merely, but absolutely void, for the reason that the punishment prescribed by the first had been suffered in part by the prisoner, and the power of the court over the subject thereby exhausted. In the brief of counsel for the prisoner his position is thus tersely stated: "The solitary confinement imposed upon the prisoner was as much a part of his sentence as was his execution. The only authority that the sheriff had to imprison him during that day and until called into court the following day was the sentence pronounced on the 29th of December. All previous commitments had expired. Their purpose had been served. The judgment and sentence of the court were the only authority on which the imprisonment could be legally justified from the 29th to the 30th of December, and the imprisonment of plaintiff in error under that sentence from the 29th to the 30th of December was the infliction of a part of the punishment covered by the sentence and a part, too, that the court had legal authority to impose." That argument, although plausible, is

not convincing. The first sentence was, it is conceded, irregular, the time intervening between the date thereof and the day of execution being less than one hundred days, as prescribed by law (Criminal Code, sec. 503); but having reached the conclusion that the verdict was also irregular and should have been set aside on the motion of the prisoner, the power of the district court to correct its judgments in prosecutions for felonies will not now be examined.

This court in *Re Fuller*, 34 Neb., 581, held that the term of imprisonment of one sentenced to the penitentiary runs from the date of sentence and not from the date of his delivery to the warden; but that was a construction of section 518 of the Criminal Code, and not involving the question now under consideration. It is by section 547 provided, in substance, that the death penalty shall be inflicted in the immediate vicinity of the jail in an inclosure to be prepared under the direction of the sheriff. Although the confinement of the prisoner from the time of sentence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute. The precise question appears to have been seldom raised and the cases cited cannot be said to sustain the proposition contended for. In *People v. Meservey*, 76 Mich., 223, as well as *People v. Kelly*, 79 Mich., 320, the sentence was imprisonment in the penitentiary, and in accordance with the rule adopted by this court in Fuller's case, *supra*, was held to have commenced on the day it was imposed. In *Re Tyson*, 13 Colo., 482, the statute of 1889 provided that all persons convicted of crimes punishable by death should be delivered to the warden of the penitentiary and by him kept in solitary confinement until the day of execution. The statute in force at the time of the homicide, like ours, provided merely that every person convicted of murder in the first degree should suffer death. Tyson

having been convicted of murder in the first degree, was delivered to the warden under the act of 1889, whereupon he sought his discharge by means of a writ of *habeas corpus*, alleging that the provision for solitary confinement was in the nature of an *ex post facto* law. In disposing of that contention the court say: "Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object." The same statute was before the supreme court of the United States in *Medley, Petitioner*, 134 U. S., 160, where it was held, but without controverting the proposition that the imprisonment is not a part of the sentence proper, that the provision therein for solitary confinement was in the nature of an *ex post facto* law as to crimes previously committed. We are satisfied with the reasoning of the Colorado court and do not hesitate to adopt the conclusion reached by it, so far as applicable to the facts of the case before us.

Although it has been our endeavor to examine the merits of the question presented, we must not be understood as conceding it to be an open one at this time. We have, on the other hand, no reason to doubt the soundness of the practice long prevailing in this state by which one committed to the penitentiary is, by procuring a reversal of the judgment of conviction, considered to have waived his right to insist that the partial execution of the sentence is a bar to further prosecution; and such, while not expressly decided, logically follows from the rule asserted in *Bohanan v. State*. The judgment is reversed and the cause remanded for further proceedings by the district court.

REVERSED.

MICHAEL SHAFER V. R. S. BRIGGS.

FILED NOVEMBER 19, 1895. No. 5635.

Review: INSTRUCTIONS: CRITICISM. In this case the verdict, upon the issues joined, was sustained by sufficient evidence, and since, aside from this point, the argument on behalf of plaintiff has been confined to mere unmerited criticisms of some matters which appear in the record, and others which do not, and no substantial error has been discovered in the record of the trial in the district court, its judgment is affirmed.

ERROR from the district court of Burt county. Tried below before SCOTT, J.

H. Wade Gillis, for plaintiff in error.

Charles T. Dickinson, contra.

RYAN, C.

There was a judgment in favor of the defendant in this cause in the district court of Burt county for one cent and costs. By proceedings in error the original plaintiff seeks a reversal of this judgment. The plaintiff's claim of \$20.60, for the pasturage of certain cattle in the year 1891, was admitted in the answer of the defendant. Affirmatively, the defendant alleged the undertaking of plaintiff to pasture and care for sixteen head of cattle entrusted to him for that purpose during the summer of 1891, and that by reason of the loss of one of these cattle the defendant has been damaged in the sum of \$25, and by reason of plaintiff's failure to provide suitable care, pasturage, and water the remaining cattle had suffered deterioration in value, to the damage of the defendant in the sum of \$75. There was a prayer in the answer for judgment in favor of the defendant. The affirmative matters set up in this answer were denied by plaintiff's reply. There was no brief submitted by the

defendant in error. We shall therefore consider the alleged errors presented by the plaintiff in the order in which they are found in his brief. It would be of no use to give even a synopsis of the evidence, and it must answer every purpose to say that a greater verdict in favor of the defendant would have been justified by the proofs.

It is urged that the court refused to mark the instructions "given," and that plaintiff excepted to the refusal to so mark them. It is unfortunate for the contention that there was a refusal and an exception thereto, that the record does not show either. We have had no difficulty in determining from the record what instructions were, in fact, given. We shall therefore treat them as though marked as required by the statute.

The only remaining arguments are those directed against mere inaccuracies of expression, which in no way tended to mislead the jury, and against the language following, which it is asserted was used in an instruction given: "If you find that the plaintiff did undertake to care for defendant's cattle, as he explained, and caused the leakage of the leaking of the tanks in the pasture, in which defendant's cattle were placed, the cattle of defendant were kept from getting water," etc. It is unnecessary to reproduce the language further, for the criticisms are merely of forms of expression and not of matters of substance. It is fortunate that on the plaintiff's motion an order was procured in compliance with which the original instructions are now found in the record in this case. By reference to these it is found that the words given as being "as he explained" were in reality "as abv. explained." We cannot assume that the writer of this abbreviation did not read it correctly, using the word "above" instead of the abbreviation "abv." The clerk of the district court, no doubt innocently, made the mistake; yet it is but a mistake in transcribing. The language "and caused the leakage of the leaking of the tanks" is next attacked as unintelligible and therefore

misleading. We cannot state that there was originally a mistake, but it appears that, reading the type-written words only, there was the inaccuracy which above appears to exist. Following the word "leakage" there appears in the transcript, as having been written with a pen, the words "that because," so that, as now disclosed by the transcript, the language was, "caused the leakage, that because of the leaking of the tanks," etc. By reference to the original instruction we find that the words "that because" were therein as now shown in the transcript. The final criticism of a portion of the language already quoted is in the following paragraph: "The court says plaintiff must respond in damages because he allowed defendant's cattle to get in the mud, when by the following, 'of the tanks in the pasture in which the cattle were placed,' the court puts the whole herd into a tank, and this may have caused the leakage of the leaking." These captious criticisms have been noticed with perhaps more patience than they deserve, because, when all the facts are stated, it is easily seen how unjustly the presiding judge has been criticised. It is true that in some parts of his instructions more accurate language might have been used, and yet it is a fact that the plaintiff's counsel, with all his zeal, and with some apparent feeling, has been unable to point out a single error in any matter of substance. The judgment of the district court is

AFFIRMED.

ALVA CHAMBERS V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. NO. 7789.

1. **Rape.** The word "abuse," in the sense in which it is used in section 12 of the Criminal Code, is synonymous with the word "ravish." Following *Palin v. State*, 38 Neb., 862.

2. ———: INSTRUCTIONS. An instruction, in effect that carnal abuse does not necessarily mean abuse by sexual intercourse, attempted or accomplished, *held* erroneous.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Robert W. Richardson, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

RYAN, C.

It is provided in section 12 of our Criminal Code that: "If any male person of the age of eighteen years or upwards shall carnally know or abuse any female child under the age of fifteen years with her consent, every such person so offending shall be held guilty of rape." The plaintiff in error was convicted in the district court of Douglas county of carnally abusing a female child under the age of five years and was sentenced to imprisonment in the penitentiary for a term of twenty years. On the trial the jury was instructed that "Carnal abuse does not necessarily mean abuse by sexual intercourse or by attempted sexual intercourse." In *Palin v. State*, 38 Neb., 862, it was held that the word "abuse," in the sense it is used in section 12 of the Criminal Code, is synonymous with "ravish." In *Dawkins v. State*, 58 Ala., 376, it was held that "the term 'abuse' in the statute punishing carnal knowledge, or abuse in attempting to have carnal knowledge, of a female child under ten years, must be limited in its meaning to injuries to the genital organs in the attempt at carnal knowledge falling short of actual penetration. It was not intended to mean other forcible or wrongful ill-usage such as might support an indictment for assault with intent to ravish." The language of the Alabama statute, to which reference was made in the above quoted syllabus of the

Dolan v. McLaughlin.

case, was as follows: "Any person who has carnal knowledge of any female under the age of ten years, or abuses such female in the attempt to have carnal knowledge of her, must, on conviction, be punished," etc. (Alabama Code, 1876, sec. 4306.) Within itself this statute provides that the abuse must be in the attempt to have carnal knowledge of a female, yet, strangely enough, we find that the word "abuse" is often defined as a mere attempt at carnal knowledge, and the case of *Dawkins v. State, supra*, is cited as authorizing this as a correct general definition of the word. (*Vide* Desty, American Criminal Law, sec. 135; Rapalje & Lawrence's Law Dictionary; Bouvier's Law Dictionary; Black's Law Dictionary.) The definition adopted in *Palin v. State, supra*, has, we think, support in authority more satisfactory than those definitions which follow *Dawkins v. State*. In view of either class of definitions of the word "abuse," however, the language of the instruction above quoted was without warrant. The judgment of the district court is therefore reversed and the cause is remanded to the district court.

REVERSED AND REMANDED.

WILLIAM H. DOLAN ET AL. V. ROSA McLAUGHLIN ET AL.

FILED NOVEMBER 19, 1895. No. 5901.

1. **Intoxicating Liquors: ACTION ON SALOON-KEEPERS' BONDS:**

INSTRUCTIONS. Where, in a petition, it was alleged, and the proofs therewith corresponded, against two licensed saloon-keepers and the sureties on their bonds that the surviving members of a family had been deprived of their means of support by the death of the head of the family, which death took place while such head of the family was in a deranged and stupid state, superinduced by periods of intoxication at intervals extending over a period of five months' time, the last of which period of

Dolan v. McLaughlin.

intoxication had been two weeks after any liquor had been sold, and that to some of the fits of intoxication the principals contributed by sales of liquor, *held*, a misleading error to instruct the jury that "where several liquor dealers furnish intoxicating liquors, the use of which results in intoxication and damage, each dealer is equally liable, and that, in case one dealer furnishes the first draught while the user thereof is perfectly sober, and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication."

2. ———: ———: ———. In an action for damages against licensed liquor dealers and the sureties on their bonds for loss of support caused by the death of the head of the family alleged to have been brought about by intoxicating liquors sold by such dealers, where there had been introduced evidence tending to show that at least one sale was of a liquid not intoxicating, it was erroneous to instruct the jury that, "where it is shown that the person was sold or furnished liquor at a licensed saloon, the presumption is that such liquor was intoxicating."

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

The opinion contains a statement of the case.

T. M. Marquett and *E. N. Kauffman*, for plaintiffs in error:

The court erred in giving the tenth paragraph of the instructions asked by plaintiff. (*Elshire v. Schuyler*, 15 Neb., 561; *Ramtz v. Barnes*, 40 O. St., 45; *Emory v. Addis*, 71 Ill., 273; 3 Am. & Eng. Ency. Law, 258.)

Where several persons contribute to the intoxication and injury in a single fit of intoxication, they are jointly liable, but where the injury complained of consists of separable and well-defined individual acts, or where the injury complained of is furnishing liquors during a long period to a person in the habit of becoming intoxicated, the rule is different, and each is only liable for the injury produced by his own acts. (*Hitchner v. Ehlers*, 44 Ia., 40; *La. France v.*

Dolan v. McLaughlin.

Krayer, 42 Ia., 143; *Flint v. Gauer*, 66 Ia., 696; *Ennis v. Shiley*, 47 Ia., 552; *Engleken v. Webber*, 47 Ia., 558; *Jewett v. Wanshura*, 43 Ia., 574; *Richmond v. Shickler*, 57 Ia., 486; *Kirchner v. Myers*, 35 O. St., 85.)

G. M. Lambertson and *F. M. Hall*, also for plaintiffs in error, contending that the tenth instruction is erroneous, cited: *Morley v. Moulton*, 45 Ill. App., 305; *Westphal v. Austin*, 41 Ill. App., 652.

Alfred Hazlett, *contra*:

The tenth instruction asked by plaintiff stated the law correctly. (*Sellars v. Foster*, 27 Neb., 127; *Roose v. Perkins*, 9 Neb., 304; *Elshire v. Schuyler*, 15 Neb., 561; *McClay v. Mangan*, 18 Neb., 44; *Wardell v. McConnell*, 23 Neb., 152; *Jones v. Bates*, 26 Neb., 693.)

Where a number of persons furnished intoxicating drink to another, and the drunkenness continued until death, and the person who took the drinks died from the effects of the drunkenness, all those furnishing liquor to produce it are liable. (*Roose v. Perkins*, 9 Neb., 304; *Wardell v. McConnell*, 23 Neb., 152; *Jones v. Bates*, 26 Neb., 693; *Greenlee v. Schoenheit*, 23 Neb., 669; *McManigal v. Seaton*, 23 Neb., 549.)

Griggs, Rinaker & Bibb, also for defendants in error.

RYAN, C.

This action was originally brought in the district court of Gage county by Rosa McLaughlin on her own behalf, as widow of John McLaughlin, and on behalf of the minor children of said John McLaughlin. The defendants were the members of the firm of John J. Patterson & Co. and the sureties on the bond of said firm given in compliance with the requirements of chapter 50, Compiled Statutes. Subsequently an amended petition was filed in which as defendants were added the names of William H.

Dolan v. McLaughlin.

Dolan as principal and J. H. Reynolds and E. P. Reynolds, Jr., as sureties on a bond of the same general nature as that originally sued upon. The manuer in which the principals named caused damage to the plaintiff and her children is thus described in the amended petition. "On the 20th day of October, 1890, and on divers other days thereafter, before and up to the 23d day of March, 1891, the said John McLaughlin, now deceased, became intoxicated and continued to drink heavily, and frequently went into a fit of intoxication and drunkenness for ten days in succession, and thereby spent his time on these days in the saloons and places of business of said defendants John J. Patterson & Co. and William H. Dolan, above named, in the city of Wymore, sometimes being in the place of business of the said John J. Patterson & Co., and at other times in the place of business of the said William H. Dolan, and would frequent the business houses of the said defendants, respectively, many times during the day and days above mentioned, and during said time, and between the said dates, the said John McLaughlin was addicted to the immoderate use of intoxicating liquors; and the said defendants John J. Patterson & Co. and the said William H. Dolan, during all of said times, did sell, give, and furnish intoxicating liquors to the said John McLaughlin, to such an extent and in such quantities that the said John McLaughlin became and was, during all of said time, an habitual drunkard, and was continually in a state of intoxication, and was thereby rendered unfit to perform labor, and was unable to carry on his business and squandered his money and did not furnish these plaintiffs with any means of support, and the said John J. Patterson & Co. and William H. Dolan, above named, furnished, and continued to furnish, liquor to said John McLaughlin in such quantities so that he became intoxicated; that on the 26th day of November, 1890, the said John McLaughlin, by reason of having drank liquor in the business houses of

the said defendants above named, became beastly drunk and wholly helpless and unable to care for himself in said intoxicated condition, and prior to and subsequent to said 26th day of November, 1890, by reason of said John McLaughlin having received intoxicating drinks from the said defendants above named, was unable to transact his business, and when the said John McLaughlin was under the influence of such liquors as aforesaid sold to him by said defendants John J. Patterson & Co. and William H. Dolan, above named, became irritable and cross and at times was almost devoid of his reason and mental faculties and was a great source of trouble and annoyance to the plaintiffs by reason of the said intoxicating liquor sold to the said John McLaughlin as aforesaid, and the said defendants John J. Patterson & Co. and William H. Dolan continued to sell and furnish liquors to the said John McLaughlin while he was so intoxicated. These plaintiffs further say that on the 6th of April, 1891, the said John McLaughlin, by reason of said intoxication as aforesaid, and while in a stupid and deranged mental condition produced by said continued intoxication, died at the time last aforesaid; that the death of said John McLaughlin was caused from the effects of the liquors sold, given, and furnished him by the said defendants John J. Patterson & Co. and William H. Dolan, above named, and used by the said John McLaughlin." Following the above quoted averments there were allegations as to the age and earning capacity of John McLaughlin, and that his widow and minor children, by his death, had been deprived of the means of support which, had he lived, he would have furnished them. There was a prayer for judgment against all the defendants in the sum of \$5,000. From a judgment accordingly rendered in the sum of \$4,000, upon a verdict for that amount against all the defendants in the district court, proceedings in error have been prosecuted by William H. Dolan and his sureties alone, all the other parties to the

suit being joined as defendants in error. It is, therefore, only incumbent upon us to consider the separate defenses made on behalf of plaintiffs in error in the district court which were, first, an admission of the execution of the bond set out in the petition, and that William H. Dolan was, from October 20, 1890, till March 23, 1891, engaged in the saloon business in Wymore; and second, a denial of each allegation contained in the amended petition, except such as had been previously admitted. There were still further averments in this answer, such as that John McLaughlin had been before his death, for a long time, an habitual drunkard, and that, in consequence, he had not contributed to the support of his family, etc. As the jury seems to have found adversely to this sort of an avoidance, not to say justification, it may be dismissed from further consideration.

As we understand the petition, the death of John McLaughlin and the subsequent loss of support of his family are the facts from which the damage is claimed to have resulted. It is true that between October 20, 1890, and March 23, 1891, various sales of intoxicating liquors to John McLaughlin were alleged to have been made, but these sales were referred to simply as contributing to his being habitually intoxicated, and perhaps therefrom resulting his diseased condition. There was no claim that between March 23, 1891, and April 6 thereafter, which latter was the day on which McLaughlin died, there had been sold to him any intoxicating liquors, nor that, in this interim, he had used such liquor. The testimony of attending physicians was that death resulted from a general breaking down of the system caused by the use of too much alcoholic stimulants, and this, as we understand it, was what was alleged in the petition.

The court instructed the jury by the tenth instruction as follows: "The court instructs the jury that where several liquor dealers furnish the intoxicating liquors, the use of

which results in intoxication and damage, that each dealer is equally liable, and that in case one dealer furnished the first draught while the user thereof was perfectly sober and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication." In a proper case the correctness of this instruction would probably be unquestioned. It, however, applied to a case wherein there may have been produced by the contributory sales of different liquor dealers a state of intoxication from, or by reason of which, directly, the damage complained of resulted. The evidence in the case at bar shows that, as early as 1881, John McLaughlin had suffered from *delirium tremens*; that with the exception of a period of about three years soon thereafter, he had habitually, up to the time of his death, indulged in frequent debauches, and that, in consequence, his general health became impaired. We cannot avoid the conclusion that, as applied to the facts of this case, both as pleaded and proved, the above instruction was probably prejudicial to the plaintiffs in error.

On the trial the proofs were that the greater part of the intoxicating liquors consumed by McLaughlin were sold to him by J. J. Patterson & Co. There were, however, a few instances as to which the testimony was that intoxicating liquors were sold to him in the saloon of William H. Dolan. This was denied by Dolan and his employes when examined as witnesses. Following this was uncontradicted testimony that, in many instances, McLaughlin had been refused whiskey, notwithstanding the fact that he urgently sought to buy and pay for it. Elias N. Whitmarsh, a witness for the plaintiff in the district court, testified that after October 20, 1890, and before 1891 [the date was not more definitely fixed], he saw John McLaughlin at the bar of William H. Dolan drink something, but whether it was water or beer he could not say. This witness said

Dolan v. McLaughlin.

that the glass out of which this drink was taken looked like a seltzer glass, and that the sale was by Dolan himself. James H. Clapp, one of Dolan's witnesses, testified that, in December, 1890, or January thereafter, he with others was in Dolan's saloon, and that McLaughlin came up with the rest and took something of a light color in a glass, and that when witness asked him what was the matter, McLaughlin answered: "Billy [Dolan], here, is a good boy, but he won't let me have anything but seltzer."

The third paragraph of the instructions given by the court was as follows: "The court instructs the jury that the sale of intoxicating liquors may be proven by circumstantial evidence, and where it is shown that the person was sold or furnished liquor at a licensed saloon, the presumption is that such liquor was intoxicating." Whether or not intoxicating liquors were by Dolan sold to McLaughlin, was the most seriously contested question in this case. The word "liquor" is defined by Webster: "1. Any liquid or fluid substance, as water, milk, blood, sap, juice, and the like. 2. Especially, alcoholic or spirituous fluid, either distilled or fermented;" as, brandy, wine, whiskey, beer, etc. If the witnesses, in describing what liquid had been sold to McLaughlin, had uniformly described it merely as liquor, it might be proper for the jury to assume that it was in that class specifically referred to in the second definition above given; but such was not this case. There was evidence that the liquid furnished by Dolan to McLaughlin, at least on one occasion, was seltzer, and within one of the definitions given above seltzer is clearly embraced. Under these circumstances it was erroneous to instruct the jury that whatever liquor is shown to have been sold in a licensed saloon is presumed to be intoxicating.

There are discussed other questions which need not in this proceeding be considered. The judgment of the district court as against the plaintiffs in error is

REVERSED.

JOHN A. CREIGHTON V. SAMUEL FINLAYSON ET AL.

FILED NOVEMBER 19, 1895. No. 5559.

1. **Principal and Agent.** The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has. (*Oberne v. Burke*, 30 Neb., 581.)
2. **Counter-Claim: REMITTITUR.** Evidence examined, and held to sustain the finding of the jury, that the contract made the basis of the defendant's counter-claim was made with defendant by plaintiff's agent, and that the making of such contract was within the scope of the agent's authority.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

McCoy & Olmsted, for plaintiff in error.

George F. Wittum, contra.

RAGAN, C.

John A. Creighton sued Samuel Finlayson and his partner in the district court of Douglas county to recover \$45.85, which he alleged was due him from the defendants for rent of room 13, in what is called the "Creighton Block," in the city of Omaha, from the 28th of April to the 23d day of June, 1888. Finlayson pleaded a counter-claim of \$74 and had a verdict and judgment, to reverse which Creighton has prosecuted to this court a petition in error.

1. The first assignment of error is that the verdict is not supported by sufficient evidence. It was admitted on the trial that Finlayson was indebted to Creighton for rent in the sum of \$45.85, and the only issue litigated related to Finlayson's counter-claim. The testimony tended to show, in behalf of Finlayson, that he and his partner had

Creighton v. Finlayson.

been tenants of Creighton in said room 13 since the spring of the year 1885; that they were job printers and had in said room, during their occupancy of it, printing presses and printing material; that in the month of May, 1888, Creighton, by his agent, one Daugherty, wrote them a letter, stating that Creighton had been advised that the fire insurance companies had agreed to increase the risks of insurance more than 100 per cent on buildings, or property in buildings, in which were located printing establishments, and requesting Finlayson and his partner to secure other premises; that at divers times between that date and the 18th of June conversations and negotiations took place between Finlayson and Creighton, through his agent Daugherty, in reference to Finlayson moving out of the leased premises; and that, on the 18th of June, Daugherty agreed with Finlayson that if the partners would remove at once from the Creighton property, Creighton would pay the necessary expenses incurred in removing; that they did move out on the 23d of June; that the expenses necessarily incurred in moving were \$74. The evidence on behalf of Creighton traversed the foregoing, but the evidence is sufficient to sustain the finding of the jury, that Creighton, through his agent, agreed with Finlayson that if he would move out of the leased premises, Creighton would pay the necessary expense of the removal, and the evidence is sufficient to sustain the finding of the jury that the necessary expenses of said removal were \$74. It is insisted, however, by the plaintiff in error that if this contract was made, it lacked consideration. We do not think so. Looking at the situation of the parties, as disclosed by the evidence, if Creighton promised to pay the expense of the removal if Finlayson would at once remove and he did so, it certainly cannot be successfully urged that the contract lacked consideration to support it. Another argument is that the evidence does not show that Finlayson complied with his contract. The testimony is,

that Creighton's agent said, "If you will move right out, move right away," etc. It is now argued that Finlayson did not comply with the contract and move right away, but postponed his removal from May to the 23d day of June, but this argument assumes that the contract was made in May, whereas the evidence tends to show that it was made on the 18th of June, and that Finlayson at once looked up another location and began packing his printing material and preparing to remove, and finally vacated the premises on the 23d of June. Again, it is insisted that the evidence does not support the finding of the jury, that Daugherty, as Creighton's agent, was invested with authority to make the contract made the basis of Finlayson's counter-claim. It appears from the testimony offered in behalf of Creighton that Daugherty was his agent for the leasing and managing and collecting of the rents of his property. Whether the making of such a contract as the one pleaded by Finlayson was within the scope of his authority, was made a question of fact for the jury and properly submitted to them under the instructions of the court. We cannot say, as a matter of law, that Daugherty's agreement to pay Finlayson the costs of removing from the premises was beyond the scope of his authority as Creighton's agent, when we consider the facts and circumstances in evidence in the case. The apparent authority of an agent which will bind a principal is such authority as an agent appears to have by reason of the actual authority which he has. (*Oberne v. Burke*, 30 Neb., 581; *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb., 480.) Daugherty had the authority to lease the premises of Creighton, to collect the rents, and look after the management and property generally. This was his actual authority, and we think the evidence sufficient to sustain the finding of the jury, that in making the contract with Finlayson he did not go beyond the scope of his agency.

2. The second assignment of error is that the court erred in giving to the jury on its own motion the following instruction: "In this case the defendants claim in their answer by way of counter-claim that the plaintiff agreed with them, in consideration of their moving from said premises, to compensate them for the expense of moving; and that the evidence shows that such expenses amounted to about \$70 or \$75." The criticism made upon this instruction is that by it the court expressed his opinion to the jury that the evidence showed that the necessary expense of Finlayson's removal was \$70 or \$75. There is no merit whatever in this criticism. The court told the jury what the defendants claimed in their answer by way of counter-claim, and that the defendants claimed that the evidence showed that the expense of removal was \$70 or \$75.

3. The third argument relied upon for reversal of the judgment is that the verdict is excessive. The jury found a verdict in favor of Finlayson for \$40. The court required a remittitur of \$4.02, and thereupon rendered judgment against Creighton for \$35.98. Under the pleadings and the admitted evidence Creighton was entitled to be credited with rent \$45.85; interest upon this sum at seven per cent per annum from the 28th of April, 1888, to the 21st of September, 1891, that being the first day of the term of court at which the judgment was rendered, \$10.95 nearly, or a total of \$56.80. The amount of counter-claim pleaded by Finlayson was \$74. If the jury found that the expense of removal was \$74, he was entitled to interest on this at seven per cent per annum from the 18th of June, 1888, to the first day of the term of court, or \$16.85, making a total of \$90.85. The difference between \$90.85 and \$56.80 should have been the verdict of the jury, or \$34.05. The judgment, as already stated, was \$35.98, or \$1.93 too much under the evidence. Finlayson will have permission to remit from the judgment \$1.93 within twenty days, and in case of his doing so, the judg-

Wigton v. Smith.

ment of the district court will be affirmed; and in case of his failure to do so, the judgment will be reversed.

JUDGMENT ACCORDINGLY.

WIGTON & WHITHAM V. WILLIAM G. SMITH.

FILED NOVEMBER 19, 1895. NO. 7509.

1. **Action Against Attorneys to Recover Money Collected: CONTRACT: PLEADING: INSTRUCTIONS.** The plaintiff in his petition alleged that the defendant, an attorney at law, had received from the clerk of a district court the sum of \$—— for his, the plaintiff's, use; that he had demanded said money of defendant and the latter had refused to pay it over, and that said defendant had not come into the possession of said money by virtue of any contract with him, the plaintiff. The defendant answered admitting the receipt and retention of the money sued for; that it was paid to said clerk of the district court by a railroad company in satisfaction of a judgment obtained against it by the plaintiff; that defendant was plaintiff's counsel in that case, and that the money sued for was the amount of compensation which the plaintiff agreed the defendant might retain out of said judgment for his services in obtaining it. On the trial the district court instructed the jury as follows: "You may by your verdict allow the defendant such amount for his services and expenses as you may believe from a fair consideration of all the testimony in the case he is entitled to receive." *Held*, That the plaintiff, under the allegations in his petition, was entitled to recover all the money for which he sued or none; that the defendant, under the allegations of his answer, was entitled to retain all the money in his hands or none, and that, therefore, the instruction was erroneous.
2. **Pleading.** A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. *Hastings School District v. Caldwell*, 16 Neb., 68, and *Savage v. Aiken*, 21 Neb., 605, followed.

ERROR from the district court of Madison county. Tried below before ROBINSON, J.

Wigton & Whitham, pro se.

H. C. Brome and Mapes & Hazen, contra.

RAGAN, C.

In the district court of Madison county William G. Smith recovered a judgment against Wigton & Whitham, a copartnership engaged in the practice of law, and they have brought such judgment here for review. To a proper understanding of the errors assigned for a reversal of this judgment it becomes necessary to summarize the pleadings.

Smith in his petition alleged that on the 23d day of March, 1888, Wigton & Whitham received from the clerk of the district court of Platte county the sum of \$10,795.25 for his, Smith's, use; that before the filing of his petition he had demanded the payment of said money from Wigton & Whitham and they had refused to account for and pay over any of said money except the sum of \$7,668.50, leaving a balance due Smith of \$3,126.75; that said Wigton & Whitham obtained said money from the clerk of the district court of said Platte county by virtue of no contract with him, Smith.

Wigton & Whitham in their answer alleged that in September, 1881, Smith was the owner of a claim or cause of action for damages against a railroad company; that he then employed Wigton as his attorney to collect said claim from said railroad company by suit or compromise; that he, Smith, agreed to advance and pay all expenses and costs incurred by Wigton in the prosecution or settlement of such claim, and to pay Wigton as compensation twenty per cent of all the money received from said railroad company on account of said claim; that Wigton accepted said employment and undertook the collection of said claim on the express condition that Smith would advance and pay the expenses and costs necessarily incurred by Wigton in the settlement or prosecution of the claim; that Wigton

was unable to effect a compromise of the claim, and in July, 1882, brought suit for Smith against the railroad company; that Smith failed and neglected to advance or pay any of the expenses or costs incurred by said Wigton in the prosecution of said suit, and that he, Wigton, was compelled to and did advance and pay such costs and expenses; that the suit brought by Wigton against the railroad company was by the district court of Madison county dismissed; that Wigton, or Wigton & Whitham, prosecuted to the supreme court of Nebraska a petition in error to reverse said judgment of dismissal, and that said supreme court did reverse the said judgment of dismissal of said case, and thereupon it was agreed between Wigton and Smith that the contract existing between them in reference to the collection of Smith's claim for damages against said railroad company should no longer be in force. In September, 1885, a new contract was entered into between Smith and Wigton & Whitham, in and by which they agreed to prosecute the action of said Smith against said railroad company to final judgment and collect the judgment when obtained, and to loan to Smith the money necessary to pay the costs and expenses, including the costs and expenses already advanced by Wigton, that might be incurred in the future prosecution of the case; that if such action should be terminated by one trial in the district court, Smith should pay Wigton & Whitham, as compensation for their services, forty per cent of the amount of the judgment recovered and collected; if the case should be tried more than once in the district court, or if the case should again be taken to the supreme court, Smith was to pay Wigton & Whitham for their services a sum equal to fifty per cent of the judgment recovered and collected; that when the suit was finally terminated Wigton & Whitham should collect the judgment, deduct therefrom whatever should be owing to them for moneys loaned by them to Smith, and to pay the costs and expenses of carrying on said litigation; that in case Smith

Wigton v. Smith.

should finally fail to recover, Wigton & Whitham should have nothing for their services; that said case was tried the second time in the district court of Madison county and resulted in a verdict for Smith; that this verdict was, on motion of the railroad company, set aside and a new trial ordered; that in 1886 a change of venue was taken in said case and the same removed to the district court of Platte county, where it was again tried in January, 1887, and resulted in a verdict in favor of Smith in the sum of \$10,000; that the railroad company prosecuted a petition in error to the supreme court to reverse this judgment; that the supreme court affirmed the judgment on the 6th of January, 1888; that on the 23d day of March, 1888, the railroad company paid to the clerk of the district court of Platte county the sum of \$10,795.25 in full of said judgment; that Wigton & Whitham received the amount of such judgment from the clerk of the district court of Platte county; that they deducted from the same \$344.80, the amount of money advanced and paid by them for Smith for costs and expenses, and paid one-half of the remainder, to-wit, \$5,225.48, to Smith, as per the terms of their contract.

To this answer Smith replied: An admission that he employed Wigton in 1881 to collect his claim against the company; that he agreed to pay him for his services twenty per cent of the money collected; that in 1883 Wigton stated to him, Smith, that he would not further prosecute the suit against the railroad company unless Smith would agree to pay him a sum equal to forty per cent of the amount recovered; that he was compelled to and did agree to pay said Wigton forty per cent of the amount recovered; that such agreement was without consideration. The other averments of the reply amounted to a general denial of the allegations of the answer.

It is obvious from these pleadings that Smith, under the allegations of his petition, was entitled to recover all the money for which he sued, or none at all. Having alleged

in his petition that the money for which he sued was received by Wigton & Whitham from the clerk of the district court of Platte county for his use, and not by virtue of any contract existing between him and Wigton & Whitham, his case must stand or fall on the allegations of that petition. The averments of his reply cannot be looked to to help out his petition. A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. (*Hastings School District v. Caldwell*, 16 Neb., 68; *Savage v. Aiken*, 21 Neb., 605. Wigton & Whitham having admitted the receipt of the amount of the judgment rendered in favor of Smith against the railroad company, having admitted that they retained in their hands fifty per cent of the judgment collected, and having pleaded that they did and do so under and by virtue of an express contract with Smith, if this averment of their answer was established, they were entitled to a verdict in their favor and a judgment dismissing Smith's cause of action. If the contract pleaded by Wigton & Whitham in their answer was not established, the judgment should have been against them for all the money claimed by Smith in his petition.

While the jury was deliberating upon its verdict it made in writing this inquiry of the district judge: "Can the jury allow Wigton & Whitham their expenses in railroad cases if only allow forty per cent? A. J. Stafford, Foreman." To this inquiry the court answered in writing as follows: "You may by your verdict allow the defendants such amount for their services and expenses as you may believe from a fair consideration of all the testimony in the case they are entitled to receive." This instruction was erroneous, and the verdict of the jury being for about one-half the sum sued for, shows on its face that the instruction was prejudicial to Wigton & Whitham. There was no issue in the case as to what the services rendered by Wigton & Whitham for Smith were reasonably worth. There was no

Burkett v. Clark.

claim made in either pleadings or evidence by any party to the suit that Wigton & Whitham were or were not entitled to retain out of the Smith judgment such an amount of money as would be a reasonable compensation to them for the services they had rendered him. As already stated, Smith's claim in his petition was that they had and held in their possession the entire judgment collected, less the amount they had paid him, for his use; that he had demanded this money of them and that they had refused to pay it over. In other words, the petition of Smith was framed upon the theory that Wigton & Whitham had been guilty of a tort in collecting and retaining this judgment. On the other hand, Wigton & Whitham claimed the right to retain the money for which they were sued under and by virtue of an express contract with Smith, and there was no room in this case, under any view of the pleadings, for the court to tell the jury that they might fix the value of the services of Wigton & Whitham at such an amount as the jury might believe from the evidence they were entitled to receive. (*Mayer v. Ver Bryck*, 46 Neb., 221.)

The judgment of the district court is reversed and the cause remanded with instructions to the district court to grant the parties to the suit leave to replead if they so desire.

REVERSED AND REMANDED.

CALVIN M. BURKETT V. JANE E. CLARK ET AL.

FILED NOVEMBER 19, 1895. No. 5675.

1. **Executions: DUTIES OF OFFICERS.** Sections 491a, 491b, 491c, and 491d, Code of Civil Procedure, examined, and the duties of an officer holding an execution for the sale of real estate found to be as follows: (1) To levy the execution upon said real estate; (2) to call an inquest of two disinterested freeholders of the

county where the real estate is situate and administer to them an oath to impartially appraise the interest of the execution defendant in the real estate levied upon; (3) to make application in writing to the county clerk, clerk of the district court, county treasurer, and town, city, or village treasurer, where the real estate is situate, requesting such officers to certify to him the amount and character of all liens existing against the real estate levied upon which are prior to the lien under which the officer desires to sell; (4) with said freeholders to impartially appraise at its real value in money the interest of the execution defendant in the real estate about to be sold; (5) to forthwith deposit a copy of the appraisement made, together with the written application made by him for liens to the county, town, city, and village officers, and the certificates furnished by such officers to him in the office of the clerk of the court from which the execution issued; (6) to immediately thereafter advertise the real estate for sale.

2. ———: ORDER OF SALE. The terms "execution" and "order of sale" are used interchangeably in such statutes, and either is but a written command, under the seal of the court, authorizing and directing the officer to whom it is directed to execute the court's judgment. (*Kelley v. Vincent*, 8 O. St., 415.)
3. ———: LEVY. To levy an execution is to do the acts by which an officer sets apart and appropriates, for the purpose of satisfying the writ, a part or the whole of a defendant's property. (*Lloyd v. Wykoff*, 11 N. J. Law, 218.)
4. ———: ———. What acts must be performed by an officer, in order that they may constitute a levy upon real estate sought to be sold under an execution issued on a judgment at law, not decided.
5. Order of Sale: LEVY. Since real estate ordered to be sold by a decree in equity has by such decree already been appropriated and set apart to satisfy the decree, no actual levy thereon need be made by an officer holding an execution by which he is commanded to sell such real estate.
6. ———: DECREE. It is thought such an order of sale should contain, or have attached thereto, a copy of the decree, as the officer in making such sale must strictly follow the terms of the decree. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)
7. ———: DUTY OF SHERIFF. The word "forthwith," found in section 491d of the Code, means immediately; without delay; directly,—regard being had to the nature of the act required to be performed. (*Moffat v. Dickson*, 3 Colo., 313.)

8. ———: ———. The copy of the appraisalment, together with the written application for liens and the certificates of liens mentioned in said section 491*d*, must be deposited in the office of the clerk from which the execution issued, before the sale is advertised.
9. ———: ———. The sentence, "It may be deposited any time before sale," found in the third paragraph of the syllabus of *La Plume v. Jones*, 5 Neb., 256, overruled.
10. ———: ———. The object of the statute in requiring an officer to deposit the appraisalment made, the application for liens, and the certificates of liens furnished, before advertising the sale, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised, to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisalment before the sale occurs.
11. ———: APPRAISEMENT: OBJECTIONS. The sheriff and freeholders in making the appraisalment act judicially, and objections that the value put on the property is too high or too low must be made and filed in the case with a motion to vacate the appraisalment before the sale. (*Vought v. Foxworthy*, 38 Neb., 790.)
12. ———. Section 490 of the Code is a legislative sanction and adoption of the ancient writ of *venditioni exponas*,—a writ by which an officer is commanded to sell property already levied upon. (Freeman, Executions, sec. 57; *Bellingall v. Duncan*, 3 Gilm. [Ill.], 477.)
13. **Judicial Sales.** By section 504 of the Code the legislature made the writ of *venditioni exponas* applicable to sales of real estate.
14. **Executions.** The life of an execution from a court of record is limited by section 510 of the Code to sixty days from its date, and must be returned within that time, whether it be the original or an *alias* writ.
15. ———: APPRAISEMENT: SALE. Section 495 of the Code construed, and held to be a limitation on the power of an officer to advertise and offer for sale real estate more than twice under one appraisalment.
16. ———: RETURN. An officer holding an execution and having levied the same upon real estate, whether he has offered it for sale or not, and if he has offered it for sale, whether he has sold

it or not, must return the execution within sixty days from its date, stating what he has done under it.

17. —: APPRAISEMENT. An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under an original or an *alias* writ.
18. —: —. An officer has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale.

ERROR from the district court of Saline county. Tried below before HASTINGS, J.

W. H. Morris, for plaintiff in error.

J. H. Grimm, E. W. Metcalfe, and M. H. Fleming, contra.

RAGAN, C.

In the district court of Saline county Jane E. Clark and others brought suit against Calvin M. Burkett to foreclose an ordinary real estate mortgage. In due time a decree was rendered as prayed, the property sold, and Burkett appeared and resisted the confirmation of the sale, which was, however, confirmed, and he has prosecuted to this court a petition in error to reverse the judgment or decree of confirmation. The order of sale was dated and issued September 1, 1891, and the sheriff caused the property to be appraised twice and twice offered it for sale, once in the month of October and once in the month of November of said year. The property, however, was not sold on either of those occasions for want of bidders. The sheriff, then, without returning his order of sale, on the 18th of November advertised the property for sale a third time, and sold it on the 21st of December. This is the sale in controversy. On the 23d of November the sheriff caused this property to be re-appraised. December 10 he filed in the office of the clerk of the district court, from which his execution or order of sale was issued, the re-appraisement made by him of the prop-

erty, and on the 22d of December he filed in the office of the clerk of the district court the certificates of liens existing against the property made by the clerk of the district court, the county treasurer, and the register of deeds of Saline county, and on the same day he returned the order of sale, reciting that he had appraised the real estate and sold it; but the return omitted all mention of the first appraisement of the real estate, its having been twice advertised for sale, twice offered for sale, and not sold for want of bidders. Burkett insisted before the district court that the sale made should not be confirmed and insists here that the judgment of confirmation should be reversed for the following reasons:

1. That the sheriff advertised the premises for sale before re-appraising them and before filing in the office of the clerk of the district court the re-appraisement made of the premises, together with the certificates furnished him by the clerk of the district court, the register of deeds, and the county treasurer, in pursuance of the statute. The question presented involves the construction of sections 491a, 491b, 491c, and 491d of the Code of Civil Procedure. These sections, so far as material here, are as follows:

"Sec. 491a. Whenever, hereafter, execution shall be levied on any lands and tenements, the officer levying the same shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, or persons, or corporation against whom the execution is levied, in the property so levied upon, and such officer, together with said freeholders, shall appraise said interest at its real value in money, and such appraisement shall be signed by such officer and said freeholders, respectively.

"Sec. 491b. That for the purpose of the appraisement mentioned in the last preceding section, the officer and the freeholders therein named shall deduct from the real value

of the lands and tenements levied on, the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, or persons, or corporation against whom or which the execution is levied.

"Sec. 491c. It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county, and the treasurer of the village, town, or city, wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, on application of the sheriff in writing, holding such execution, to certify to said sheriff, under their respective hands and official seals, the amount and character of all liens existing against the lands and tenements levied on, which are prior to the lien of such levy, as the said liens appear of record in their respective offices. * * *

"Sec. 491d. The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section 3 of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued, and shall immediately advertise and sell said real estate, lands, and tenements agreeably to the provisions of this act." * * *

What do these sections require of an officer holding an execution for the sale of real estate? We first remark that these sections of the statute make no distinction between an ordinary execution issued on a judgment at law and an execution or order of sale based on a decree in equity. The terms "execution" and "order of sale" are used interchangeably. The duties of an officer as to appraising real estate which is about to be sold are the same, whether he be

selling on execution based on a law judgment or an equity decree. Whether the writ which the officer holds be called an execution or an order of sale, it is but a written command, under the seal of the court, authorizing and directing him to execute its judgment (*Kelley v. Vincent*, 8 O. St., 415); and in cases like the one at bar, where the officer is commanded to sell real estate to satisfy a decree of foreclosure of a mortgage against it, it would seem to be the better practice to embody in, or attach to, the order of sale a copy of the decree, for the reason that the officer, in making such a sale, must do so in strict conformity to the terms of the decree. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)

Recurring to the statutes just quoted, we observe that section 491a declares that whenever an execution shall be levied on any land, the officer levying the same shall, etc. This would seem to imply that the first duty of an officer after receiving an execution, commanding him to sell real estate, would be to levy upon such real estate. What is a levy? To do the acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of a writ of execution, a part or the whole of a defendant's property. (Anderson's Law Dictionary; *Lloyd v. Wykoff*, 11 N. J. Law, 218.) Just what acts must be performed by an officer in order that such acts may constitute a levy upon real estate sought to be sold under an execution issued on a judgment at law is a question not presented by this record and not decided, and we are not aware of any statute which defines a levy or declares what an officer holding an execution must do in order that his acts may constitute a levy upon real estate; but since to levy an execution is to set apart and appropriate the property of a certain person for its satisfaction, we are quite clear that an officer holding an execution or order of sale, in and by which he is commanded to sell certain real estate therein described for the satisfaction of such execution, is not obliged, in or-

der to perform the duty of levying upon such real estate, to go upon the same, take possession of any part of said real estate, put up a notice upon said real estate, or make proclamation thereon to the effect that he has levied upon it, since the court by the decree has already by its judgment set apart and appropriated, as it were, the real estate described for the satisfaction of the execution in the officer's hands. The next step such an officer is required to take by said section 491a is that he shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situate, and administer to them an oath impartially to appraise the interest of the person against whom the execution is levied. The next duty of such officer is prescribed by section 491c, and requires that he shall make an application in writing to the county clerk, the clerk of the district court, and the county treasurer of the county where the real estate is situate, requesting said officers to certify to him the amount and character of all liens existing against the real estate levied upon, which are prior to the lien under which the officer desires to sell; such liens to be certified as they appear of record in the office of said officers. It is to be noted that this section now requires such an application to be also addressed to the treasurer of the village, town, or city in which such real estate is situate, but this requirement was not in force in 1891, when this case arose. The next duty required of such an officer is found in section 491a, which commands him and said freeholders to impartially appraise, at its real value in money, the interest of the execution defendant in the real estate about to be sold. This appraisement of the execution defendant's interest is to be performed in accordance with said section 491b, which requires the sheriff and two freeholders, acting as appraisers, to deduct from the real value of the real estate levied upon the amount of all liens and incumbrances for taxes or otherwise existing against the real estate and which are

Burkett v. Clark.

prior liens to the lien on which the officer is about to sell. The officer having levied upon the property, and having appraised the interest of the execution defendant therein, section 491d provides that he "shall forthwith deposit a copy of" the appraisal made, together with the written application made by him to the clerk of the district court, county treasurer, and register of deeds, and the certificates furnished by them to him, in the office of the clerk of the court from which the execution which he holds was issued. After this deposit has been made, the statute (Code, sec. 491d) provides that the officer "shall immediately advertise the real estate." It will thus be seen that the officer holding an execution for the sale of real estate has not authority to advertise the same for sale until he has levied upon it, caused it to be appraised, and deposited in the office of the clerk from which the execution in his hands was issued a copy of the appraisal made by him and the two freeholders, together with the application in writing for liens made by him to the clerk of the district court, the county treasurer, and the register of deeds, and the certificates which such officers furnished him in pursuance of said application.

The word "forthwith," found in section 491d, means immediately; without delay; directly,—regard being had to the nature of the act required to be performed. (*Inman v. West Fire Ins. Co.*, 12 Wend. [N. Y.], 452; *Moffat v. Dickson*, 3 Colo., 313; *Bennett v. Lycoming County Mutual Ins. Co.*, 67 N. Y., 274.) But whatever the technical meaning of "forthwith" in this statute, and whether the facts and circumstances of a particular case would excuse and protect an officer who neglected or delayed the depositing of the appraisal, one thing is beyond all question, viz., that the appraisal must be deposited before the sale is advertised. The statute must be construed as if it read: "The officer holding such appraisal shall forthwith deposit a copy thereof and thereupon shall immedi-

ately advertise," etc. He shall advertise after he has deposited a copy of the appraisement, not before.

In *La Flume v. Jones*, 5 Neb., 256, in the third point of the syllabus it was said that such an appraisement might be deposited any time before sale. In this case LAKE, C. J., speaking for the court, said: "The next point relied on is, that the 'sheriff failed to deposit a copy of the appraisement * * * with the clerk.' In answer to this objection it may be said that the record is silent as to when such copy was in fact deposited. It shows simply that a copy of the appraisement was, in fact, deposited. It will in such case be presumed that the sheriff did his duty, and made the deposit before the publication of the notice of the sale." There is no doubt but that this is law, but, unfortunately, the learned chief justice continued as follows: "But even if the sheriff had neglected his duty in this respect, it would not be ground for setting the sale aside, if it were in fact deposited before the sale took place," and cited in support of this last remark *Merritt v. Borden*, 2 Dis. [O.], 503. In the case cited section 433 of the Code of Civil Procedure of the state of Ohio was construed. That section contained the identical language found in section 491*d* above quoted, and the court said: "The question submitted to this court is this: Whether the inquisition taken by the sheriff was filed with the clerk within the time required by section 433 of the Code. It appears the advertisement for the land was published before the inquisition was filed, and we have held in general term that no publication can be legally made until the sheriff has deposited a copy of the valuation in the clerk's office. The language of the section is: 'The officer receiving such return shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and immediately advertise and sell such real estate agreeably to the provisions of this title.' We shall adhere to the construction we then gave to the

Burkett v. Clark.

statute, having found no reason since it was announced why it should be changed or in any particular modified." The decision in *La Flume v. Jones, supra*, was entirely correct under the facts of the case, but all that was said by the chief justice in that case, to the effect that the failure of the sheriff to deposit the appraisement before advertising the sale would not be ground for setting it aside, was *dictum*, and the last sentence in the third point of the syllabus, viz.; "It may be deposited any time before sale," is overruled. In the case at bar the officer advertised the property for sale before he appraised it, did not file the appraisement made until some eleven days before the sale occurred, and, so far as the record shows, he did not file a copy of the application made by him for liens existing against the real estate. The object of this statute in requiring an officer to deposit in the office of the clerk of the court from which the execution issued, before advertising the sale, a copy of the appraisement made, a copy of his application for liens, and the certificates of liens made by the clerk of the district court, register of deeds, and the county treasurer, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised and to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisement before the sale occurs. Generally, this can only be done before the sale, since the sheriff and the freeholders in making the appraisement act judicially, and objections that the value put on the property is too high or too low must be made and filed in the case with a motion to vacate the appraisement before the sale occurs. (*Vought v. Foxworthy*, 38 Neb., 790.)

2. The second alleged irregularity of the officer relied on here for reversing the decree of confirmation is the sell-

ing of the property under the execution of September 1. The contention is that the life of the execution had expired prior to the date of the sale. The contention involves an examination and construction of sections 490, 504, 510, and 495, Code of Civil Procedure. These sections of the statute have all been in force in this state since 1866. Section 490 provides, in substance, that when an officer has levied an execution on goods and chattels and the same have not been sold for want of bidders, the officer must return the writ of execution, and that thereupon the plaintiff in execution may sue out another writ directing the sale of the property already levied upon. Section 504 provides: "If lands and tenements levied on, as aforesaid, are not sold upon one execution, other executions may be issued to sell the land so levied upon." Section 510 provides: "The sheriff or other officer, to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof." Said section 490 is but a legislative sanction and adoption of the ancient writ known as "*venditioni exponas*." Mr. Freeman, in his work on Executions, section 57, thus defines it: "This writ is, therefore, properly defined as the writ which compels an officer to proceed with the sale of property levied upon under a *feri facias*." (*Bellingall v. Duncan*, 3 Gilm. [Ill.], 477.) At common law, real estate could not be sold on execution, but it may under our statutes be taken for the satisfaction of a judgment at law in the absence of finding personal property out of which to satisfy the writ; and by said section 504 the legislature has made the writ of *venditioni exponas* applicable to sales of real estate; and the legislature, by said section 510, has limited the life of an execution to sixty days, whether it be an original or *alias* writ. In view of these provisions of the statute it was the duty of the officer in the case at bar to return the execution issued to him, of date September 1, to the court to which it was

made returnable within sixty days from said date, unless some other provision of the statute authorized him to retain the execution and proceed under it after it had expired.

It seems to be the contention that the officer was authorized to cause the property in controversy to be re-appraised and offer it for sale under such re-appraisement on the execution of September 1, notwithstanding it had expired, and that authority for this contention is found in section 495. That section is as follows: "In all cases where real estate may hereafter be levied upon, by virtue of any execution or order of sale, and shall have been appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the officer to cause a new appraisement of such real estate to be made, and successive executions or orders of sale may issue at any time in vacation, after the return of the officer 'not sold for want of bidders,' at the request of the plaintiff or his attorney." We do not so understand it. The statute is a limitation upon the power of an officer to more than twice advertise and offer for sale real estate under one appraisement. But for this statute an officer would be compelled to make but one appraisement of real estate which he desired to sell under execution. He might go on indefinitely offering and advertising the property for sale and thus incumbering it with unnecessary costs and expenses. We reach the conclusion, therefore, that when the officer in the case at bar had caused the real estate to be appraised and had first offered it for sale in October, and it was not sold for want of bidders, that he then should have returned his writ to the court to which it was made returnable, setting forth what he had done under it, as he could not have again advertised the property for thirty days and offered it for sale within the life of the execution. Having returned his writ, the plaintiff in the execution, in either vacation or term time, might, by virtue of the provisions of said sections 495 and 504, have taken out an-

other writ commanding the officer to again advertise and offer for sale the lands already levied upon and appraised under the former writ. If the officer had once levied upon the lands and once appraised them and had twice offered them for sale and they were not sold for want of bidders, he should have returned his writ of execution stating what he had done; and if the plaintiff in execution sought to, and did, take out another writ, then it became the duty of the officer, under the third writ, to cause the real estate to be re-appraised and again advertised for sale. In other words, it amounts to this, that an officer holding a writ of execution, and having levied the same upon real estate, whether he has offered it for sale or not, and if he has offered it for sale, whether he has sold it or not, must return the execution within sixty days from its date, stating what he has done under it; and for a failure to return the writ in such time he is liable to be amerced under the provisions of section 513 of the Code. But an officer is required to make but one appraisal of real estate until it has been twice advertised and twice offered for sale, whether under the original writ or an *alias*, and he has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale under the former appraisal. What is said herein with reference to the return of an execution or order of sale has no application to a case of an officer holding a certified copy of a decree, in and by which decree specific real estate is ordered sold.

The decree of the district court confirming the sale is reversed and the cause remanded with instructions to tax to the complainants in the decree the costs of this proceeding, the costs of the second and third advertisements of the property, and the costs of its second appraisal.

REVERSED AND REMANDED.

ADDISON B. JOHNSTON ET AL. V. MILWAUKEE & WY-
OMING INVESTMENT COMPANY.

FILED NOVEMBER 19, 1895. No. 7367.

1. **Principal and Agent: CORPORATIONS.** One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws.
2. ———: ———. Therefore, the apparent authority of such agent cannot be extended or restricted by such by-laws in the absence of actual notice thereof.
3. ———: **CUSTOM AND USAGE: EVIDENCE.** Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business.
4. ———: ———: ———. Evidence of such apparent authority is not restricted to proof of general custom or to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business, usage not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance and the agent apparently entirely in charge of the business, may in proper cases be, among other things, elements for consideration.

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

See statement in opinion and a former report in 35 Neb., 554.

John L. Webster, for plaintiffs in error:

A manager of a live stock company would have author-

ity to sell its cattle without any provision in the charter or by-laws creating the office of manager. (*Hamm v. Drew*, 83 Tex., 77.)

Every person dealing with a corporation is bound to take notice of its by-laws as well as of its articles of incorporation. (*Bockover v. Life Association of America*, 77 Va., 91; *Bocock v. Alleghany Coal & Iron Co.*, 82 Va., 920; *Relfe v. Rundle*, 103 U. S., 222.)

The presumption is that an agent in charge of property at a point remote from the home office of the company is clothed with authority to transact all business touching such property. (*Rathbun v. Snow*, 123 N. Y., 343; *Hamm v. Drew*, 83 Tex., 77; *Whitaker v. Kilroy*, 70 Mich., 638.)

When the plaintiff company made Adams its agent in charge of its property in Wyoming, it necessarily clothed him with the functions of a general agent, and gave him apparent authority to sell the property and should not now be heard to say that the powers of Adams were special, and not general. (*Grafius v. Land Co.*, 3 Phila. [Pa.], 447; *Lee v. Pittsburg Coal & Mining Co.*, 56 How. Pr. [N. Y.], 376; *Duncan v. Hartman*, 143 Pa. St., 595; *Spangler v. Butterfield*, 6 Colo., 356; *Sacalarias v. Eureka & P. R. Co.*, 18 Nev., 155; *Adams Mining Co. v. Senter*, 26 Mich., 73; *Ceeder v. Loud Lumber Co.*, 86 Mich., 541; *State v. Heckart*, 49 Mo. App., 280.)

The sale of the cattle by Adams was within the scope of his apparent authority. (*Atlantic & P. R. Co. v. Reisner*, 18 Kan., 458; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind., 398; *Barnett v. Gluting*, 3 Ind. App., 421; *Over v. Schiffing*, 102 Ind., 196; *Badger Lumber Co. v. Ballentine*, 54 Mo. App., 180; *Austrian v. Springer*, 94 Mich., 343; *Banner Tobacco Co. v. Jenison*, 48 Mich., 459; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill., 427; *Louisville Coffin Co. v. Stokes*, 78 Ala., 372; *Talladega Ins. Co. v. Peacock*, 67 Ala., 253.)

In support of an argument in favor of the contention

that the Milwaukee & Wyoming Investment Company ratified the sale, reference was made to the following authorities: *Hughes v. Ins. Co. of North America*, 40 Neb., 627; *Cook v. Tullis*, 18 Wall. [U. S.], 338; *Starks v. Sikes*, 8 Gray [Mass.], 609; *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H., 205; *Planters Bank v. Sharp*, 4 S. & M. [Miss.], 75; *McMahan v. McMahan*, 13 Pa. St., 376; *Ogden v. Marchand*, 29 La. Ann., 61; *Charles v. State*, 11 Ark., 389; *United States Express Co. v. Rawson*, 106 Ind., 215; *Goss v. Stevens*, 32 Minn., 472; *Ruggles v. Washington County*, 3 Mo., 496; *Shoninger v. Peabody*, 57 Conn., 42; *Russ v. Telfener*, 57 Fed. Rep., 973; *Persons v. McKibben*, 5 Ind., 261; *Perkins v. Boothby*, 71 Me., 91; *Mayor v. Ray*, 19 Wall. [U. S.], 484; *Taylor v. Conner*, 41 Miss., 722; *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill., 25; *Baer v. Lichten*, 24 Ill. App., 311; *Thompson v. Peck*, 115 Ind., 512; *Moriarity v. Stofferan*, 89 Ill., 528; *Harding v. Parshall*, 56 Ill., 219; *Nichols v. Shaffer*, 63 Mich., 599; *First Nat. Bank of Trenton v. Badger Lumber Co.*, 54 Mo. App., 327; *Southern Oil Works v. Jefferson*, 70 Tenn., 581; *Gelatt v. Ridge*, 117 Mo., 555; *Long v. Osborne*, 59 N. W. Rep. [Ia.], 14.

J. W. Sparks and George H. Noyes, contra:

The plaintiff at the time of the commencement of this suit was the owner and entitled to the possession of the cattle replevied, and was entitled to a verdict, unless the defendants procured a valid title by purchase from Adams. (*Levi v. Booth*, 58 Md., 305.)

The burden of proof to establish that Adams had been held out by the plaintiff as possessing an apparent authority greater than his real authority, and as having an authority to sell the cattle, rested upon the defendants. (*Baltimore & Ohio Employees Relief Association v. Post*, 122 Pa. St., 579; *Hays v. Lynn*, 7 Watts [Pa.], 525; *American Life*

Ins. & Trust Co. v. Schu'tz, 82 Pa. St., 46; *Bond v. Pontiac, O. & P. A. R. Co.*, 62 Mich., 643.)

The mere fact that the plaintiff had entrusted the care, management, and possession of the cattle to Adams, gave him no authority to sell them. Nor did the directions to ship the cattle to commission merchants, to be sold by them in the market, give any authority to him to make a sale. (*Warder v. Rublee*, 42 Minn., 23.)

The defendants could not base any right in this action upon the ground that they dealt with Adams as having apparent authority to sell the cattle, unless it appeared from the evidence that they knew of facts giving him such apparent authority, and acted upon such appearances in the transaction of purchasing the cattle. (*People v. Bank of North America*, 75 N. Y., 561; *Eckart v. Roehm*, 43 Minn., 271.)

Although authority on the part of an agent may, in proper cases, be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts. (*Kane v. Barstow*, 22 Pac. Rep. [Kan.], 588.)

Unless the jury found from a fair preponderance of the evidence, that Adams had performed acts of a character similar to the acts performed by him as disclosed by the evidence prior to the sale of the cattle, and that the plaintiff, after knowledge thereof, ratified such prior similar acts, they would not have been justified in finding that Adams possessed the apparent authority to sell the cattle. (*Eckart v. Roehm*, 43 Minn., 271; *Graves v. Horton*, 38 Minn., 66; *People v. Bank of North America*, 75 N. Y., 561; *Reynolds v. Continental Ins. Co.*, 36 Mich., 131; *McKindly v. Dunham*, 55 Wis., 515; *Kane v. Bartow*,

Johnston v. Milwaukee & Wyoming Investment Co.

22 Pac. Rep. [Kan.], 588; *Banks v. Everest*, 35 Kan., 687.)

If there was anything known to defendants at the time, likely to put a reasonable business man upon inquiry as to the authority of Adams, then it was their duty to inquire how far the acts of Adams were in pursuance of the limitations put upon his authority by the plaintiff. If the defendants failed or neglected to make such inquiries, they could not claim to be protected in dealing with Adams as having apparent authority to sell. (*Hurley v. Watson*, 68 Mich., 531; *Rust v. Eaton*, 24 Fed. Rep., 830.)

The company gave Adams no implied or apparent authority to sell. (*Bickford v. Menier*, 107 N. Y., 490; *Dodge v. McDonnell*, 14 Wis., 553*; *New York Iron Mine v. First Nat. Bank*, 39 Mich., 644; *Coquillard's Admr. v. French*, 19 Ind., 274; *Billings v. Morrow*, 7 Cal., 171; *Hodge v. Combs*, 1 Black [U. S.], 192; *Hawthorne v. Bourne*, 7 M. & W. [Eng.], 595; *Hampton v. Mathews*, 14 Pa. St., 105; *Swazey v. Union Mfg. Co.*, 42 Conn., 556.)

The rights of the parties being determined as of the date of the commencement of the suit, proof of what happened subsequently thereto is unavailing to show ratification. (*Powell v. Henry*, 96 Ala., 412; *Wittenbrock v. Bellmer*, 57 Cal., 12.)

The following authorities were also cited upon the question of ratification: *Flagg v. Flagg*, 39 Neb., 229; *Pemigewasset Bank v. Brackett*, 4 N. H., 557; *Corbett v. Swinbourne*, 8 Ad. & El. [Eng.], 673; *Hornfager v. Hornfager*, 6 How. Pr. [N. Y.], 279; *Hope v. Brinkerhoff*, 4 Edw. Ch. [N. Y.], 660; *Hoyt v. Sheldon*, 4 Abb. Pr. [N. Y.], 59; *Ormsbee v. Brown*, 50 Barb. [N. Y.], 436; *Farwell v. Myers*, 59 Mich., 179.

IRVINE, C.

This was an action of replevin for 250 head of cattle by the defendant in error against the plaintiffs in error. On

the first trial there was a verdict and judgment in favor of the defendants in the district court. This judgment was reversed by this court. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554.) The case has been retried, resulting in a verdict and judgment for the plaintiffs, and the defendants now prosecute error. The evidence is substantially the same as on the first trial, and the facts having been stated somewhat in detail in the former opinion, we refer to that and will not restate them, except that, in view of one argument now made, it should perhaps be stated that the business of the corporation, as set forth in its charter, is "buying, selling, raising, shipping, exchanging, and dealing in all kinds of cattle, horses, and other live stock, in the territory of Wyoming," etc., and that the duties of the manager, as provided by the by-laws, and as briefly referred to in the former opinion, are prescribed as follows: "The manager and assistant manager shall reside and keep their office in the territory of Wyoming and shall have the charge and management, subject to the orders of the directors, of all the affairs and property of the company in said territory."

On the former hearing the case was decided solely on the effect of the evidence as to a custom in Wyoming whereby the manager of a cattle ranch, it was claimed, had power to sell cattle therefrom, and the court in the former opinion laid down certain rules for the determination of that question alone; that is, as to what was necessary in order to establish a custom vesting in the manager authority to so dispose of cattle. As now presented an entirely different question arises. On the trial in the district court a special verdict was taken whereby, under instructions conformable to the former opinion, the jury found that no such custom prevailed. The jury also found that prior to the sale of the cattle in question Adams had not, with the plaintiff's knowledge, performed any similar acts, and under a peremptory instruction there was a finding

that Adams possessed no actual authority to make the sale. There were other findings not material to the questions which we shall consider. The former opinion strongly implied a holding that no actual authority existed for the sale made by Adams, and we shall not here reconsider that question. The judgment in favor of the plaintiffs was evidently entered on the theory that, in the absence of such actual authority, or apparent, conferred either by a custom of business or by the exercise of prior similar acts, the plaintiffs could not be bound by Adams' acts. One instruction given by the court clearly shows that the judgment proceeded on this theory. This instruction was as follows:

"An act is within the apparent authority of the agent when it is of like character as that of prior acts performed by him for the same principal, and which such principal, knowing the same, sanctioned or ratified. The act of an agent within his apparent but not within his real authority will bind his principal only in case the person dealing with such agent knew of such prior acts and dealt with the agent in reliance thereon; and in this case you are instructed that unless you find from a preponderance of the evidence that Thomas R. Adams had prior to the sale of these cattle performed acts of a similar character, and that the plaintiff, after knowledge or notice thereof, sanctioned or ratified such prior similar acts, then you will not be justified in finding that Adams possessed the apparent authority to sell the cattle in question. The defendants cannot base any rights in this action upon the ground that they dealt with Thomas R. Adams as having the apparent authority to sell the cattle unless it appears from the evidence that they, or one of them, knew of facts giving such apparent authority to Adams, and acted upon such appearances in the transaction of purchasing the cattle in question.

"The mere fact that the plaintiff had entrusted the care, management, and possession of these cattle to Thomas R. Adams, gave him no authority to sell them. Although

authority on the part of an agent may in proper cases be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts."

In the light of all the instructions it was clearly the view of the court that, it having disposed of the question of actual authority, and the jury having found that no such general custom existed as would, under the former opinion of the court, confer authority upon the agent, no apparent authority could exist unless by the exercise by the agent of such authority in the past, supplemented by knowledge of those acts on the part of the company, and by similar knowledge on the part of defendants, relied on by them in making the purchase. It is familiar law that a principal is bound by the acts of his agent, not only when performed within the scope of his actual or implied authority, but when within the scope of apparent authority conferred upon him by the principal. There have been many cases distinguishing in this respect between a general agent and a special agent; and perhaps this distinction is not without value, although in most cases it simply throws back one step the process of investigation. Indeed, with regard to acts of corporations it has often been said that the only general agents are its directors acting in their corporate capacity. Strict application of the distinction would, therefore, constitute all acts of corporations not performed under a resolution of the board of directors the acts of special agents, and would require all persons dealing with corporations, except in pursuance of such resolutions, to proceed at their peril. This at one stage of the law might have been a proper doctrine, but the courts must take notice of the fact that the province of corporations is now vastly enlarged; that corporations

now exist, not only for the transaction of public or ecclesiastical affairs, but for the purpose of carrying on ordinary business transactions. We have now private corporations, not only operating railroads and other institutions having *quasi*-public functions, but also corporations conducting banks, manufacturing establishments, live stock raising, as in the present instance, and even retail shops. The domain of individual enterprise has, in other words, been invaded by corporations, and in the conduct of such enterprises we can see no reason and no principle of law requiring the application of rules to such corporations different from those applying to individuals under similar circumstances, except where the acts relate to the operations of the corporation in its capacity as such. What we mean to express by this is that in transactions having no relation to the corporation in its corporate capacity, but solely in regard to the conduct of its business affairs, the general principles applicable to individuals should apply.

It is argued that one dealing with a corporation is, as a matter of law, bound to take notice of its charter and of its by-laws; that one cannot, therefore, claim any right under the act of an agent of a corporation whose authority by its by-laws is so restricted as to invalidate such an act; that the converse of this must be true, and that, therefore, one dealing with an agent of a corporation, empowered by its by-laws to perform a particular act, may protect himself under such by-law, although he had no actual notice thereof and although by specific instructions the agent had been forbidden to perform such act. Following out this line of argument, it is contended that the by-law providing for a manager conveyed upon him authority to sell cattle, and that such authority could not, as against a stranger, be restricted by private instructions. To this, however, we cannot assent, although it has received some support from the courts. Certain cases in the New York supreme court lend credit thereto, but they are rudely disturbed by the state-

ment of the court of appeals (*Rathbun v. Snow*, 123 N. Y., 343), that "by-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations *per se* as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency." An opinion of the supreme court of Virginia (*Bocock's Executor v. Alleghany Coal & Iron Co.*, 82 Va., 913) also is in support of the contention, but its force as authority is destroyed by the fact that it is based on a flagrant misquotation of a decision of the same court in *Bockover v. Life Association*, 77 Va., 85, the court in that case having correctly quoted from *Relfe v. Rundle*, 13 Otto, [U. S.], 222. The earlier Virginia case and the case in the supreme court of the United States relate to an entirely different question. Both courts laid down an entirely different doctrine, and the opinion in the later Virginia case disregards the point in controversy in the cases cited, and very materially misquotes the language of the court. The better doctrine is that of the New York court of appeals in *Rathbun v. Snow*, already quoted, when restricted to the business operations of the corporation, and not applied to the performance of corporate acts, such as the issuance of bonds or like acts where the corporate powers are themselves involved, as distinguished from the particular exercise of powers clearly possessed by the corporation, by subordinate agents thereof.

The sale of these cattle was clearly within the power of the corporation, the only question was the apparent authority of this particular agent of the corporation to make the sale, and we may thus divest ourselves in the present inquiry of all investigation as to corporate functions, and consider whether or not there was error in the judgment independent of the fact that the plaintiff is a corporation. A review of the authorities bearing on the question would

be almost endless, and their confusion is such that it would hardly be profitable. We conceive that the rule whereby a principal is bound by the acts of his agent beyond his actual authority, but within its apparent scope, is founded in the first place on the maxim that where one of two innocent persons must suffer, it should be that one who misled the other into the contract (Story, Agency, sec. 443), and this doctrine is founded on a broad principle of equitable estoppel or estoppel *in pais*. We conceive that a proper statement of it, with reference to such a case as we have before us, is as follows: That where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it. We do not think that in order to bring a case within this principle it is in all cases necessary to show that by general custom, as defined in the former opinion of the court, such agents have such authority; nor do we think that it is necessary in all cases to show that the same agent had previously performed similar acts; that such acts were known to the principal; that the third person also knew of them, and relied on them in the transaction, or even that similar agents had in the past performed such acts. A number of elements may influence the solution of the question. In this case the corporation was located in Milwaukee, in the state of Wisconsin. It was formed for the purpose of doing business in Wyoming, and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. (*Rathbun v. Snow, supra.*) One might be justified in dealing with a person in apparent management of the business in Wyoming, where the

office of the corporation was in a distant state, where he would not be so justified if he found the general offices and general officers of the corporation at or near the place where the business was conducted. Furthermore, the general nature of the business and its requirements was an element for consideration. (*Montgomery Furniture Co. v. Hardaway*, 16 So. Rep. [Ala.], 29.) It might well be that one would be justified in buying ripe fruit from one found in charge of orchards where he might not be justified in dealing with such a person in goods not perishable in their nature. Business usage might have its influence, although not so general and uniform as by implying notice to the principal to also imply that such custom was in view when the agent was appointed. We mention these instances merely by way of illustration, and we hold that the apparent authority of the agent, beyond his actual authority, does not depend solely upon custom or solely on the performance of previous similar acts, whether known or unknown to a person dealing with him, but that, subject to the general rule we have above stated, and to general legal principles, the question is one of fact to be determined by the jury under all the circumstances of the transaction and the business, as disclosed by the evidence.

It follows that the special findings referred to were insufficient whereon to found the judgment, and that the instruction quoted was erroneous.

REVERSED AND REMANDED.

LUKE S. OTIS V. ZERI M. BUTTERS.

FILED NOVEMBER 20, 1895. No. 5763.

Review: UNAUTHENTICATED TRANSCRIPT: DISMISSAL. A petition in error will be dismissed out of this court when founded upon a transcript not authenticated by the certificate of the clerk of the trial court.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Allen G. Fisher and *A. W. Crites*, for plaintiff in error.

C. H. Bane, *contra*.

NORVAL, C. J.

Each assignment in the petition in error, as well as every proposition discussed in the brief, is predicated upon matters disclosed solely by the supplemental transcript filed by the plaintiff in error in this court on July 9, 1894, and which alone contains the purported judgment sought to be reviewed. This transcript cannot be recognized by us, inasmuch as it is not authenticated by the certificate of the clerk of the court below, as by statute required. Following *Moore v. Waterman*, 40 Neb., 498, and *McDonald v. Grabow*, 46 Neb., 406, decided herewith, the petition in error is dismissed.

DISMISSED.

GEORGE PFLUEGER V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1895. No. 6783.

1. **Jury:** ORDER TO SUMMON. It is not error for the trial court in a prosecution for a felony to order the summoning by the sheriff of persons qualified to serve as jurors, in anticipation of a demand for talesmen after the regular panel shall have been exhausted.
2. **Homicide:** INSANITY AS DEFENSE: EVIDENCE. In a prosecution for murder, the defense relied upon being insanity at the time of the homicide, an order previously made by the proper county board finding the accused to be a fit subject for treatment in the hospital for the insane is, at most, evidence of the defense relied upon, and raises no conclusive presumption that the accused was at the time in question insane in the sense that he is not accountable for the act charged.
3. ———: CONFESSIONS. Statements in the nature of confessions by the accused *held* voluntary and rightly admitted in evidence.
4. ———: INSANITY: EVIDENCE OF NON-EXPERT WITNESS. A non-expert witness may in a prosecution for murder, the necessary foundation therefor having been laid, be examined as to his opinion regarding the sanity of the accused, and may state whether in his judgment the latter was able to distinguish between right and wrong with respect to the particular crime charged.
5. ———: ———: ———. The opinions of non-expert witnesses who have known the accused for fifteen years and who met and observed him almost daily for six weeks or more immediately preceding the commission by him of a homicide, their attention being particularly directed to his mental condition, are admissible as bearing upon the question of his sanity.
6. ———: ———: INSTRUCTIONS. Instructions defining insanity as defense in prosecutions for murder examined and approved.

ERROR to the district court for Cuming county. Tried below before NORRIS, J.

The facts are stated in the opinion.

C. C. McNish and A. R. Oleson, for plaintiff in error:

The court erred in overruling the objections of accused to summoning jurors by special venire. (*Dupont v. McAdow*, 9 Pac. Rep. [Mont.], 925; *Lincoln v. Stowell*, 73 Ill., 246; *Kennon v. Gilmer*, 4 Mont., 450.)

Where insanity is once shown to exist it will, unless from a temporary cause, be presumed to continue until the contrary is made to appear. (*Physo-Medical College v. Wilkinson*, 9 N. E. Rep. [Ind.], 167; *State v. Wilner*, 40 Wis., 304; *Rogers v. Walker*, 6 Pa. St., 371; *Cochran's Will Case*, 1 T. B. Mon. [Ky.], 264.)

Where insanity is relied upon as a defense in a criminal action, and testimony has been offered which rebuts the legal presumption that the accused was sane, the burden is upon the prosecution to establish beyond a reasonable doubt that he possessed sufficient mental capacity to comprehend the nature of the act complained of. (*Wright v. People*, 4 Neb., 407; *Hawe v. State*, 11 Neb., 537; *Hart v. State*, 14 Neb., 572; *Anderson v. State*, 25 Neb., 550; *Ballard v. State*, 19 Neb., 609; *Polk v. State*, 19 Ind., 170; *Stevens v. People*, 31 Ind., 485.)

If the prisoner raises a reasonable doubt as to his sanity, it is necessary that the state should prove mental soundness beyond a reasonable doubt. (*Guetig v. State*, 66 Ind., 94; *State v. Crawford*, 11 Kan., 32.)

Where insanity is shown to exist a short time before the act, the evidence should show sanity at the time or the jury should acquit. (*State v. Johnson*, 40 Conn., 136.)

There was error in the rulings as to the effect to be given the proceedings of the commissioners of insanity. (*Hutchinson v. Sandt*, 4 Rawle [Pa.], 234.)

The court erred in permitting non-expert witnesses to testify as to the mental capacity of the accused. (*Shultz v. State*, 37 Neb., 481.)

If the state failed to prove beyond a reasonable doubt

that the accused had recovered from insanity before the commission of the crime, he should have been acquitted. (*In re Gangwere*, 14 Pa. St., 428; *Imhoff v. Witmer*, 31 Pa. St., 245; *Klohs v. Klohs*, 61 Pa. St., 247.)

A. S. Churchill, Attorney General, and George A. Day Deputy Attorney General, for the state:

In an argument to sustain the ruling of the lower court as to the manner of selecting the jury reference was made to the following authorities: *Dodge v. People*, 4 Neb., 229; *McElvoy v. State*, 9 Neb., 157; *Clough v. State*, 7 Neb., 324.

The counsel for plaintiff in error argued that the finding of the commissioners of insanity and the order of the district court directing the accused to be confined in the hospital for the insane adjudicated the question of the prisoner's insanity. This proposition is supported neither by reason nor authority. (*Dewey v. Allgire*, 37 Neb., 6; *Leggate v. Clark*, 111 Mass., 308; *Knox v. Haug*, 48 Minn., 58; *Wheeler v. State*, 34 O. St., 394.)

The confessions were properly admitted in evidence. (*Furst v. State*, 31 Neb., 403; *Heldt v. State*, 20 Neb., 496.

Post, J.

This is a petition in error by George Pflueger, who seeks the reversal of a judgment of the district court for Cumming county, whereby he was convicted of murder in the second degree, the crime charged being the killing of his wife, Anna Pflueger.

1. The first of the allegations of error which we shall notice is that which relates to the manner of selecting the jury. It is shown by the transcript that an information was filed by the county attorney on the 27th day of January, 1893, charging the plaintiff in error with the crime of murder in the first degree. On May 15, following, a

second information was filed, charging the same offense, that first mentioned having been quashed on motion of the accused, and on the same day the sheriff was ordered to summon thirty-six additional jurors. We find no record of the order last mentioned, but the direction to the sheriff was in writing, under the seal of the court, and commanded the summoning of thirty-six good and lawful men from the body of the county to appear before said court on the following day to serve as petit jurors. From the sheriff's return, made May 16, it appears that the required number of jurors (therein named) had been summoned in accordance with the command of said writ. On the day last named, the accused having entered a plea of not guilty, the selection of a jury was begun, whereupon the following proceedings were had, quoting from the bill of exceptions:

"This exhausts the jurors of the regular panel who are in attendance. As some of the jurors have not reported, defendant asks that the regular panel be exhausted before proceeding further, which request is granted without objection by the plaintiff. Court now takes a recess until 1:30 o'clock P. M. of the same day.

"On the reconvening of court at 1:30 P. M., pursuant to adjournment, it being reported by the sheriff that the remainder of the jurors drawn on the regular panel are unavoidably and excusably absent, the special venire of thirty-six names is resorted to for the purpose of filling the panel. Counsel for the defendant at this time object to the calling of any of the jurors summoned by the special venire in this case, for the reason that the list has not been prepared as required by the Statutes of Nebraska, being section 6093 thereof (sec. 465a, Criminal Code), and for the further reason that said special venire was ordered issued in this case before ever the information upon which the jury is now being impaneled was filed. Objection overruled, to which ruling the defendant excepts."

As each of said special venire-men was passed for cause

by the state, a challenge was interposed by the accused in substantially the same language, viz.: "Counsel for defendant challenges the juror for cause, and for the further reason that he is a special talesman called by the sheriff upon the venire issued before information was filed." Upon one of such challenges the following proceedings appear:

"Counsel for defendant challenges the juror Wilde, on the ground that he is one of the jurors called by the special venire not issued according to law. Counsel for plaintiff objects to the challenge, for the reason that on yesterday afternoon, at about 5 o'clock, C. C. McNish, counsel for defendant, stated to the court that there would not be over eight jurors in the regular panel that would be competent to sit as jurors, in his opinion, and that it would require a long time to impanel a jury, and that the court then suggested that it would be well that a special venire should issue for thirty-six talesmen to expedite the impaneling of a jury when the regular panel was exhausted; that upon consultation with the court and counsel on both sides, the court ordered the special venire, upon which the juror, to whom the objection is now made, was called by the sheriff. Counsel for defendant objects to the record being made in this form, for the reason that neither this defendant nor his counsel have requested the issuance of a special venire in this case.

"By the Court: Then let the record read that the special venire was ordered by the court with the knowledge of counsel on both sides and without any objection being made by either side,—with the knowledge of and without any objection of counsel.

"Counsel for defendant objects for the further reason that that was upon another information, to which the defendant had filed a motion to quash, and in the neighborhood of four hours before this information, upon which the defendant is now upon trial was filed. Objection overruled, to which ruling defendant excepts."

Our chief difficulty is in determining the facts rightly, inferable from the foregoing record. If the so-called special venire was merely to assist the sheriff by securing the attendance of competent talesmen, and if the talesmen required were, in fact, called by him in the impaneling of the jury, the error alleged is not apparent, since the accused has been tried by jurors selected by the person and substantially in the manner prescribed by law. The only authority found in the statutes for a special venire is that contained in section 465a, Criminal Code, above mentioned, and which is confined to cases in which one of two or more persons charged in the same indictment has demanded a separate trial. The court may in such cases order a special venire to be drawn and summoned in the manner therein specified, and no other. Provision is made by section 664, Civil Code, for the calling of juries in certain cases by the sheriff, and for the filling by him of the panel for the term when incomplete, but the selection of talesmen for particular causes, after the regular panel shall have been exhausted, is governed by the rules of the common law. It is by section 282, Civil Code, expressly provided: "The general mode of summoning, impaneling, challenging, and swearing the jury is not changed by this code." The selection of talesmen is by the common law entrusted to the discretion of the sheriff (Thompson, Trials, 27; Murfree, Sheriffs, 394), and the right to rely upon that discretion is a substantial right which, to the accused in a prosecution for a felony, cannot be denied. But we cannot, from the foregoing record, say that there was in this instance any departure from the established practice. All presumptions are in favor of the regularity of the proceedings of the district court, and the record being silent upon the subject, we conclude that there exists no substantial ground of complaint by the accused with respect to the rulings referred to.

2. It is next contended that the district court erred in determining the effect to be given to an order of the com-

missioners of insanity for Cuming county, finding the accused insane and a fit subject for custody and treatment in the hospital for the insane. It is disclosed by the record that on the 28th day of October, 1891, an affidavit was lodged with the clerk of the district court, alleging that the accused was insane and a fit subject for treatment; that the hearing thereon was continued on his application from time to time until November 10, on which date the order first mentioned was made. It is also shown that while the accused was being conveyed to the hospital for the insane at Norfolk, a writ of *habeas corpus* was allowed by Hon. Isaac Powers, Jr., judge of the ninth judicial district, at his instance, for the purpose of inquiring into the cause and legality of his detention; that a commission was appointed by said judge to take testimony and determine therefrom whether or not he was insane, and that thereafter, on the 26th day of December, upon a finding that he was insane, the accused was remanded to the custody of the sheriff, but escaped from the latter without having been actually committed to the hospital. It is argued that these findings should be construed as an adjudication of the question of the sanity of the accused; that as such they are conclusive in this prosecution, and that the court should have directed a verdict in his favor on the ground that he was insane at the time of the homicide and, therefore, not accountable for his act. In that view we are unable to concur. The examination contemplated by chapter 40, Compiled Statutes, entitled "Insane," is *ex parte*, and for the purpose simply of determining whether a particular person is a fit subject for treatment in the hospital for the insane. Practically the same question was presented to this court in *Dewey v. Allgire*, 37 Neb., 6, where, referring to the statute mentioned, it is said: "By section 54 of the same chapter the term 'insane,' as used in the act, is defined to include every species of insanity or mental derangement. * * * The records of similar proceedings have been held inadmissible

in such cases as we are now considering, in *Leggate v. Clark*, 111 Mass., 308, and in *Knox v. Haug*, 48 Minn., 58, and we think the reasoning in those cases is sound. In the case of *Wheeler v. State*, 34 O. St., 394, it was held that while such inquisitions were not even *prima facie* evidence of insanity, they were admissible as tending to prove the fact; but the authorities cited in the opinion in the latter case are all based upon inquisitions *de lunatico*, and the court seems to have mistaken the distinction between the subjects of inquiry in the two proceedings. We think that these records were improperly admitted in evidence." We have at this time no reason to question the soundness of the conclusion there stated, or to doubt its applicability to the facts of the case at bar. The findings were not only received in evidence, but the jury were instructed that they established *prima facie* the insanity of the accused and imposed upon the state the burden of proving that he was sane at the time of the homicide. The ruling complained of, if erroneous, did not prejudice the rights of the accused and presents no ground of complaint by him.

3. It is claimed that the court erred in receiving evidence of certain confessions of the accused on the ground that they were not shown to have been voluntarily made by him; but that contention is without support in the record. The statements proved were evidently voluntary in the strictest sense of the term, and within the rule frequently asserted by this court. (See *Heldt v. State*, 20 Neb., 496, and *Furst v. State*, 31 Neb., 403.)

4. Among other witnesses called by the state in rebuttal to establish the sanity of the accused was the latter's brother, Henry Pflueger, who, from his relation to the former, was, it is conceded, competent to testify as a non-expert witness. He was, however, over the objection of the accused, examined by counsel for the state, as follows:

Q. Now, in your opinion, did he [the accused] at that time [the day of the homicide] have sufficient mind to tell the difference between right and wrong?

A. Oh, yes. He knew the difference between right and wrong.

Q. Did he have sufficient mind to know the difference between right and wrong as to the crime of murder?

A. Yes.

Q. Now, in your opinion, did he on that day have mental capacity enough to know the difference between right and wrong as to the crime of murder?

A. Yes; I think he knew that day between right and wrong.

Q. Did you think that on the 20th day of February, 1892 [the day preceding the homicide], he had sufficient mind to know the difference between right and wrong as to the crime of murder?

A. Yes.

The objections, it should be stated, go to the form of the questions only, no exception being taken to the answers on the ground that they are not responsive. This case, on the record quoted, differs from *Shultz v. State*, 37 Neb., 481, relied upon by counsel for the accused. In that case non-expert witnesses were by the district court permitted to testify that the prisoner did in fact know the difference between right and wrong at the time of the homicide charged, and on review upon petition in error to this court it was held that for obvious reasons the testimony should have been confined to the opinions of the witnesses, leaving the jurors to draw their own inferences therefrom. The killing being conceded, the vital question is, whether the accused is accountable for his act, and which depends for its solution upon whether he was, or was not, at the time he took the life of the deceased, able to distinguish between right and wrong with respect to the particular act involved. Tested by that rule it would seem that the evidence complained of was rightly admitted. (*State v. Lewis*, 20 Nev., 333; *Carr v. State*, 24 Tex. App., 562; *United States v. Guiteau*, 1 Mack. [D. C.], 498; *Rodgers*, Expert Testi-

City of Omaha v. Megeath.

mony, secs. 69, 71.) *Shults v. State*, so far as it asserts a different view, is modified to conform to the rule asserted by the authorities above cited.

5. It is alleged that the court erred in permitting Crawford and Briggs, witnesses for the state, to testify regarding the sanity of the accused, but we think otherwise. Said witnesses had known the accused for more than fifteen years, and each had seen and observed him almost daily from the commencement of the proceedings before the commissioners of insanity, on the 28th day of October until December 17, following, their attention having been particularly directed to the question of his mental condition. The foundation was otherwise sufficient and the witnesses qualified to testify under the rule in *Shults v. State, supra*.

Exception is taken to the refusing of certain instructions requested by the accused, but there is no error in the ruling assigned, since the propositions therein stated had been given in the charge of the court.

6. Finally, it is said that the court erred in giving the third instruction requested by the state. It is sufficient, without entering into a discussion of the paragraph assailed, that it was examined and approved by this court in *Thurman v. State*, 32 Neb., 226. We find no error in the record and the judgment is

AFFIRMED.

CITY OF OMAHA V. JAMES G. MEGEATH ET AL.

FILED NOVEMBER 20, 1895. No. 5893.

1. **Municipal Corporations: IMPROVEMENT OF STREETS: LIABILITY OF ABUTTING OWNERS.** Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express conditions in the deed of

conveyance, that the grantee should lay out and improve said strip as a street and forever after keep the same in good repair and order at its own expense, such city, for improving or keeping in repair such street, cannot require payment by its grantors because of their ownership of the aforesaid abutting property, and the same exemption from liability exists in favor of one who has since purchased a part of said abutting property.

2. ———: ———: INJUNCTION. Under the above circumstances an injunction will lie to restrain a sale being made by the city of any of the abutting property aforesaid, and against the collection from any owner of such adjacent property, of the cost of improving or of keeping in repair any portion of said street.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The facts are stated by the commissioner.

W. J. Connell, for plaintiff in error:

The contract made by the giving and acceptance of the deed with the condition as written was such that it could benefit only the grantors and their heirs. The form of the contract is well known to the law, and it is equally well known that under such a contract no third parties, under any circumstances, can derive any benefits or legal rights whatever. In addition to the intention which the law imputes to the grantors from the peculiar form of the contract adopted by them, the deed on its face, and in express terms, confines all benefits reserved by the condition to the parties executing the instrument, and their heirs. A breach of the condition named in the deed cannot be enforced in a court of equity, because equity will not enforce forfeitures, and because, for a breach of such conditions, the party entitled to sue has an adequate remedy at law. The defendants, having full notice of the exact form of the agreement created by the deed, are presumed to know its legal effect was to confine all benefits arising thereunder to the grantors and their heirs, and that, therefore, no acts of the city done

in fulfillment of the contract could create an estoppel in favor of the defendants. (*Chute v. Washburn*, 46 N. W. Rep. [Minn.], 555; *McElroy v. Morley*, 19 Pac. Rep. [Kan.], 341; *Bangor v. Warren*, 34 Me., 329; *Hooper v. Cummings*, 45 Me., 359; *Warner v. Bennett*, 31 Conn., 468; *Schulenberg v. Harriman*, 21 Wall. [U. S.], 63; *Ruch v. City of Rock Island*, 97 U. S., 693; *Guild v. Richards*, 82 Mass., 317; *Skinner v. Shepard*, 130 Mass., 180; *Cross v. Carson*, 8 Blackf. [Ind.], 138; *Fonda v. Sage*, 46 Barb. [N. Y.], 122; *Southard v. Central R. Co.*, 26 N. J. Law, 21; *Norris v. Milner*, 20 Ga., 563; *Smith v. Brannan*, 13 Cal., 107; *Nicoll v. New York & E. R. Co.*, 12 N. Y., 132; *Jones v. St. Louis, K. C. & N. R. Co.*, 79 Mo., 97; *Martin v. Skipwith*, 6 S. W. Rep. [Ark.], 516; *Missouri Historical Society v. Academy of Science of St. Louis*, 8 S. W. Rep. [Mo.], 346; *Messersmith v. Messersmith*, 22 Mo., 372.)

Kennedy & Learned, contra:

The execution, delivery, and acceptance of the deed constituted a contract between the parties. (*Cooper v. Foss*, 15 Neb., 516; *Shamp v. Meyer*, 20 Neb., 223; *Keedle v. Flack*, 27 Neb., 836; *Stover v. Tompkins*, 34 Neb., 465; *Hayne v. Cummings*, 16 C. B., n. s. [Eng.], 20; *Dunlap v. Mobley*, 71 Ala., 102; *Paschall v. Passmore*, 15 Pa. St., 295; *Wier v. Simmons*, 55 Wis., 637; *People v. Gosper*, 3 Neb., 285; *Hamilton v. Thrall*, 7 Neb., 210; *Newlean v. Olson*, 22 Neb., 717; *Whitney v. Union R. Co.*, 11 Gray [Mass.], 363.)

As to the burdens assumed by the city with respect to the avenues, and as to the construction of the contract by the parties, the following cases were cited: *City of Chicago v. Sheldon*, 9 Wall. [U. S.], 50; *School District v. Estes*, 13 Neb., 52; *Harbach v. Miller*, 14 Neb., 9; *Rathbun v. McConnell*, 27 Neb., 239.

The city had power to make the contract and relieve the

property in question from special assessments for local improvements. (*State v. Wilson*, 7 Cranch [U. S.], 164; *Home of the Friendless v. Rouse*, 8 Wall. [U. S.], 430; *Tomlinson v. Branch*, 15 Wall. [U. S.], 460; *First Division St. Paul & P. R. Co. v. Parcher*, 14 Minn., 224; *McGee v. Mathis*, 4 Wall. [U. S.], 143; *City of Chicago v. Sheldon*, 9 Wall. [U. S.], 50; *City of Dayton v. Pease*, 4 O. St., 100; *Argenti v. City of San Francisco*, 16 Cal., 256; *Allegheny City v. McClurkan*, 14 Pa. St., 81; *Hitchcock v. City of Galveston*, 96 U. S., 341; *Caldwell v. Rupert*, 10 Bush [Ky.], 179; *Craycraft v. Selvage*, 10 Bush [Ky.], 696; *Maher v. City of Chicago*, 38 Ill., 267; *City of Chicago v. People*, 56 Ill., 327; *Fisher v. Prowse*, 2 Best & S. [Eng.], 770; *Boughner v. Clarksburg*, 15 W. Va., 394; *Humphrey v. Pegues*, 16 Wall. [U. S.], 244; *Wilmington R. Co. v. Reid*, 13 Wall. [U. S.], 264; *Farrington v. Tennessee*, 95 U. S., 679; *Dodge v. Woolsey*, 18 How. [U. S.], 331; *Pacific R. Co. v. Maguire*, 20 Wall. [U. S.], 36; *Northwestern University v. People*, 99 U. S., 309; *O'Donnell v. Bailey*, 24 Miss., 386; *Grand Gulf R. Co. v. Buck*, 53 Miss., 246; *Atwater v. Woodbridge*, 6 Conn., 223; *Landon v. Litchfield*, 11 Conn., 250.)

The agreement was to run with the land for the benefit of subsequent purchasers. (*State v. Wilson*, 7 Cranch [U. S.], 164; *McGee v. Mathis*, 4 Wall. [U. S.], 155; *Tomlinson v. Branch*, 15 Wall. [U. S.], 465; *Duffy v. New York & H. R. R. Co.*, 2 Hilton [N. Y.], 496; *Morse v. Aldrich*, 19 Pick. [Mass.], 449; *Kellogg v. Robinson*, 6 Vt., 276; *Birdsall v. Tiemann*, 12 How. Pr. [N. Y.], 551; *Trustees of Watertown v. Cowen*, 4 Paige Ch. [N. Y.], 510; *Barrow v. Richard*, 8 Paige Ch. [N. Y.], 351; *Whatman v. Gibson*, 9 Simons Ch. [Eng.], 196; *St. Andrews Lutheran Church's Appeal*, 67 Pa. St., 512; *Hills v. Miller*, 3 Paige Ch. [N. Y.], 254; *Winfield v. Henning*, 21 N. J. Eq., 188; *Whitney v. Union R. Co.*, 77 Mass., 359; *Merrifield v. Cobleigh*, 4 Cush. [Mass.], 178; *Astor v.*

City of Omaha v. Megeath.

Miller, 2 Paige Ch. [N. Y.], 68; *Van Horn v. Crain*, 1 Paige Ch. [N. Y.], 455.)

The defendants in error had a right to bring and maintain this action, not only because the contract was made for their benefit, but to prevent illegal and unauthorized burdens being cast upon their lots. (*State v. Birkhauser*, 37 Neb., 521; *Pacific Bridge Co. v. Kirkham*, 54 Cal., 558; *Butler v. Board of Supervisors of Saginaw County*, 26 Mich., 22; *In re Rhineland*, 68 N. Y., 105; *Brush v. City of Detroit*, 32 Mich., 43; *City of Leavenworth v. Laing*, 6 Kan., 274; *Philbrook v. Kennebec*, 17 Me., 196; *Lattimer v. Livermore*, 72 N. Y., 174.)

John M. Thurston, also for defendants in error.

RYAN, C.

This action was brought in the district court of Douglas county by the owners of certain lots for a decree perpetually restraining the city of Omaha from collecting certain assessments upon the property of the petitioners lying contiguous to streets which surround Hanscom Park. The parties who sought the relief aforesaid, under A. J. Hanscom and James G. Megeath, the original proprietors of the whole tract, were owners by *mesne* conveyances of lots described as owned by each petitioner respectively. There was a decree as prayed, and the review of this judgment is sought by the city of Omaha upon its petition in error. There was no bill of exceptions, hence we must assume that each fact well pleaded in the petition was established by sufficient competent proof, and we are equally bound to assume the failure to prove all essential affirmative propositions contained in the answer.

It was alleged in the petition that the city of Omaha, prior to November 7, 1872, entered into negotiations with Andrew J. Hanscom and James G. Megeath for the purpose of securing from them and their wives a portion of their

land to be used by said city as a public park. It was further averred that the result of said negotiations was that a deed was made by A. J. Hanscom and James G. Megeath, their wives joining therein, to the city of Omaha, on November 7, 1872, of grounds for a park and a street around it; that the grantors named received no consideration for making said deed, except the benefit which would accrue to the remaining real estate of the grantors by reason of the location, improvement, and maintenance of said public park and the street or avenue surrounding the same; that the chief inducement moving said grantors to donate and convey said property was that the performance of the city on its part of all the terms and conditions contained in said deed would enable said grantors to lay out the remaining portion of their several tracts of land into lots and blocks fronting and abutting on the street or avenue lying adjacent to and surrounding said park; that said property fronting and abutting on said avenue around said park, by reason of said conditions that the said city would improve and keep in repair said avenue and park, would be more desirable for residence and other purposes; that it was well understood by the city of Omaha at the time it received and accepted said conveyance that said deed was executed by grantors for and in consideration of the benefits aforesaid which would attach especially to the lots and land fronting and abutting upon the avenue around said park. It was further alleged in the petition that by the acceptance of the aforesaid conveyance the city of Omaha was bound by the requirements of the deed whereby said conveyance was made, and that at the time of said conveyance the grantors therein named owned all the property adjacent to and facing upon the avenue surrounding Hanscom Park, and that, relying upon the faithful performance by the city of Omaha of all the terms and conditions of their said deed, the aforesaid grantors proceeded to lay out, subdivide, and plat all of the said real estate fronting and abutting upon said avenue around

said park into lots; that by *mesne* conveyances the petitioners in the district court had become owners of certain of these several lots, as in the petition described, and that, thereby, all of the conditions of the said conveyance to the city of Omaha inured to the benefit of the several owners of the aforesaid lots. It has already been indicated what relief was sought against the plaintiff in error, and against what threatened invasion of the rights of the several property owners, who joined in asking relief against the city, such relief was prayed. It is not necessary that the conditions attached to that part of the conveyance, affecting only the public park grounds, should be set out at length. For our purposes it is sufficient to refer to that part of the deed which vested in the city of Omaha the title to a strip of land eighty feet wide, which surrounded said park, for a highway or public street, and, in connection therewith, to quote the conditions affecting the same. In respect to this strip the language of the conditions was as follows: "Upon these express conditions, that it shall be forever used and occupied as a public street or highway, and that the said city of Omaha shall lay out and improve said street or highway, and shall forever keep the same in good order and repair, at the expense of said city of Omaha; and in case of failure or neglect to comply with any or all of said conditions, then, and in that case, the title to said street or highway shall revert back and reinvest in the parties of the first part, their heirs or assigns, according to their original interests."

The city of Omaha, it was alleged in the petition, had caused the highway or street surrounding Hanscom Park to be paved, and there was raised no question that this paving was properly done, and that, as done, it was in compliance with the requirement that the city should improve said highway and keep the same in good order and repair. Plaintiff in error, however, insists that the sole remedy available to any one was by re-entry for condition

broken, and this, it was contended, resulted from the provisions of the deed itself. It was argued that the law abhors forfeitures, and that, even if a right to enforce a forfeiture existed, it must be denied to the defendants in error, because, by law, the right of re-entry for condition broken is limited to the grantors and their heirs. For the purposes of this case it might be conceded that the provisions of the deed under consideration amount to conditions subsequent, and that it therefore results that for any breach of these conditions there is available only one remedy,—a right of re-entry for conditions broken limited to the grantors and their heirs. In this case these propositions could have no applicability, for by the original petition no breach was alleged. Practically, it was therein conceded that the city, in paving as it had, had complied with the conditions imposed upon it by the provisions of the deed. The grounds of complaint were that the city, after having so paved the streets around the park, was attempting to compel payment for a part of such paving by the owners of lots which front upon this paved street. There was in the deed to the city no condition that, if it sought to compel payment in this manner, the original grantors of such street to the city, or any one else, might re-enter as for breach of a condition subsequent. Indeed, there is in the deed no recognition of a possibility of the assertion of such a right of the city to repayment of the expenses incurred, either in improving or keeping in repair this highway or street. As against the original grantors, the city could not consistently have required that its title should be recognized, and at the same time have insisted, in the face of the above conditions, that such grantors should improve and keep in repair, or, what amounts to the same thing, pay for improvements and repairs already made. Against such an attempt to ignore its obligations, no redress was provided in the deed. As against an attempt by the exercise, under the circumstances, of its power of taxation to compel such grantors to pay for

such improvements or repairs of the street, which the city, upon sufficient consideration, was bound to make, a court of equity would decree proper relief. This does not seem seriously to be questioned by the plaintiff in error, but its objection, apparently, is that the defendants in error are not entitled in this respect to be subrogated to the rights and remedies of the original grantors of the street to the city. In *Fisher v. Beard*, 32 Ia., 346, H. P. Scholte, the original proprietor of a tract of land, had designated upon the plat thereof a certain square as a public park, and had sold lots facing said square to parties who had relied upon such proprietor's representation that the said square would always be a public park. Afterwards, the designation "Public Park" was, by the proprietor, changed on the plat to "Garden Square," and still other lots facing thereon were sold upon the faith of representations by said proprietor made, that the aforesaid square should forever remain a public park. Subsequently, the original proprietor, without consideration therefor, conveyed the square in question to his wife, who, after his death, became the wife of R. H. Beard. It was alleged in a petition for an injunction that some of the plaintiffs were owners of lots facing this square by virtue of deeds from Scholte and his wife, while others of the petitioners had purchased their lots from the grantees of Scholte, and that the defendant, Mrs. Beard, was about to lay off the aforesaid square into lots and sell the same for the erection thereon of buildings for the different purposes of trade and business, to the prejudice and injury of all the plaintiffs. An injunction against the threatened injuries was, by the supreme court of Iowa, held proper, in favor not only of the original purchasers, but as well in favor of their grantees. In the discussion of this case, Miller, J., delivering the opinion of the court, said: "The right or easement acquired by the original purchasers from Scholte became affixed to the lots fronting on the square, in the nature of a covenant running with the land, and passed

to subsequent grantees of the lots, without any special assignment or conveyance thereof. Whoever purchased one of these lots to which the easement was attached became entitled thereto, and whoever became the grantee of the square upon which this easement was a burden, with notice thereof, would take the same burdened with the easement." In *Trustees of the Village of Watertown v. Cowen*, 4 Paige Ch. [N. Y.], 510, it was held that the grantee of a lot adjoining a public square, who had a special covenant from his grantor, a former owner of the lot, that the square should be kept open for the benefit of his lot and should not be built upon, might file a bill in equity to restrain his grantor from violating this covenant. These principles we have not found questioned in any adjudicated case, and most certainly they are just and equitable. The facts of the case at bar fall within the reason of these rules, and accordingly they should be applied. The city of Omaha, when it accepted the grant of the highway surrounding Hanscom Park, did so subject to the conditions expressed in the deed of conveyance of such highway. Since the city has become vested with this title there has arisen no occasion or justification for resort to a remedy by re-entry, for no condition subsequent has been violated. There has, however, been an attempt to compel the owners of lots fronting upon such highway to pay for what the city was bound itself, upon a sufficient valuable consideration, to do. By virtue of its right to levy taxes and assessments the city is able to do this injustice without resort to the courts. The parties, whose rights are invaded in this manner, have no remedy by virtue of a right of re-entry, or what has been by some courts recognized as a substitute therefor—an action of ejectment. In *Morris v. Merrell*, 44 Neb., 423, the rule laid down was that "where public officers are proceeding illegally under claim of right, they may be enjoined," and in support of this proposition several adjudicated cases were cited. The same redress is available against attempts to

Redman v. Voss.

do what the city by its contract obligations is bound not to do, as was above announced by this court with regard to proceedings in other respects illegal. The judgment of the district court was right and is

AFFIRMED.

DAVID P. REDMAN v. HENRY VOSS.

FILED NOVEMBER 20, 1895. No. 5753.

1. **Trial: RULINGS ON EVIDENCE: REVIEW.** The established rule of this court is that to enable it to review an error alleged to have been committed by a district court in the admission or rejection of evidence the testimony admitted or rejected must be specifically assigned in the petition in error.
2. **Instructions: EXCEPTIONS: REVIEW.** It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb., 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

James W. Carr, for plaintiff in error.

J. W. West and Charles Ogden, contra.

RAGAN, C.

Henry Voss, in the district court of Douglas county, recovered a money judgment against David P. Redman, and the latter has brought the same here for review, assigning as reasons for its reversal the following alleged errors:

1. That the court erred in admitting irrelevant, immaterial, and incompetent testimony. This assignment is too indefinite. The established rule of this court is that to enable it to review an error alleged to have been committed

by a district court in the admission or rejection of evidence the particular evidence admitted or rejected must be specifically assigned in the petition in error.

2. That the court erred in his statement of the case to the jury. The record does not disclose that the plaintiff in error took any exception to the statement of the case as made to the jury by the trial court, and an examination of the statement discloses that it was a concise and faultless exposition of the issues made by the pleadings.

3. That the court erred in giving paragraphs numbered 1, 2, 3, 4, and 5 of the instructions given by the court on its own motion. This assignment of error cannot be sustained for two reasons: (1.) The only exception noted to the instructions of the court is in the following language: "Counsel for both plaintiff and defendant except to the instructions of the court to the jury." It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb., 124, that if the charge of the court to the jury contains more than one proposition, and any portion of it be correct, each specified point deemed erroneous must be pointed out and separately excepted to, and that a general exception to such charge is unavailing. (2.) The only instructions given to the jury in this case were those given by the trial court upon his own motion, and an examination of the charge shows it to be not only not erroneous but beyond criticism.

4. That the verdict of the jury is not sustained by sufficient evidence. We think it is. Voss claimed that he had made some plans and specifications for a building for Redman at the latter's instance and request at an agreed price of \$300. Redman admitted making the contract with Voss for the plans and specifications, but claimed that the agreement was that a building erected in conformity with such plans would not cost to exceed \$6,000, and if it did, that he, Redman, should not pay anything for the plans; and that a building could not be erected according to, the

State v. Lansing.

plans furnished by Voss for less than \$8,000. The evidence offered by each party tended to sustain his contention.

An examination of the entire record leads us to the conclusion that not one debatable proposition of law is presented in this proceeding. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE W. BERGE, v.
ISAAC W. LANSING ET AL.

FILED NOVEMBER 20, 1895. No. 7619.

1. **Office and Officers: TIME TO QUALIFY: BONDS.** Sections 7 15, and 17, chapter 10, Compiled Statutes, should be construed together, and when so construed the effect of section 17 is to require one who has been re-elected or re-appointed to an office to qualify therefor by taking the oath and filing the bond, where a bond is required, in the same manner and within the same time as one for first time elected.
2. ———: ———: ———. Section 15, chapter 10, and section 101, chapter 26, Compiled Statutes, are not in conflict and are *in pari materia* and should be construed together. Section 101 provides that certain events shall create vacancies in office. Section 15 adds another event creating a vacancy, to-wit, neglect of the person elected or appointed to have executed and approved, and to file within the time provided, his official bond.
3. ———: ———: ———. Section 15, chapter 10, Compiled Statutes, providing that "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant," construed, and *held* to create a condition precedent to the right of a person so elected or appointed to be inducted into office. NORVAL, C. J., and RAGAN, C., dissenting.
4. ———: ———: ———. *Held, further*, That such provision is self-executing, and that unless the official bond, where one is required, is filed within the time provided by law, the person elected loses all right to the office and the vacancy can be filled without any

State v. Lansing.

previous judicial determination of the fact. NORVAL, C. J., and RAGAN, C., dissenting.

5. ———: VACANCIES: CONSTITUTIONAL LAW. Section 20, article 3, of the constitution, providing that "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind," does not prohibit the legislature from providing that vacancies in office may arise from other events, the state constitution being restrictive in its character and not a grant of power.
6. ———: ———. It seems that a distinction exists between the onsting from office of one already legally inducted and the exclusion of one not yet inducted because of his failure to perform a condition precedent.
7. ———: ———: COUNTY JUDGES. Under existing constitutional and statutory provisions, where a vacancy occurs in the office of county judge and the unexpired term exceeds one year, it should be filled by election. Whether it may be filled by appointment provisionally until the time for a general election, *quære*.
8. Elections: PUBLICATION OF NOTICE. The validity of an election does not depend upon the publication of the election notice. If, under existing circumstances, a particular office is to be filled, an election for that office is not invalid because the filling thereof was not included in the published notice of election, at least where it appears that the electors generally were apprised of the fact and voted on the question.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J.

See opinions for reference to authorities.

C. C. Flansburg, W. M. Morning, and G. W. Berge, for plaintiff in error.

Allen W. Field, J. R. Gilkeson, N. Z. Snell, and E. P. Brown, *contra*.

IRVINE, C.

The essential facts charged in the information herein are as follows: That at the general election of 1891 Isaac

W. Lansing was elected county judge of Lancaster county, and that he duly qualified and discharged the duties of his office; that at the general election in 1893 Lansing was re-elected to said office and a certificate of election issued to him, but that he did not execute any official bond or file the same in the office of the county clerk within ten days after the 4th day of January, 1894, but that on the 25th day of January, 1894, Lansing did file a good and sufficient bond, which was on the 26th day of January approved by the county board. The relator then charged that by virtue of the failure of Lansing to file his official bond within the time provided by law the office became vacant; that the relator was nominated by two political parties entitled to have their nominations placed upon the official ballot as a candidate for county judge to fill the vacancy so created; that the county clerk in the notice of election for 1894 did not include the office of county judge as one of the offices to be filled, but that he placed the name of the relator and the name of another candidate upon the official ballot and upon the sample ballots, which were duly distributed, and that the voters had general knowledge of the candidacy and of the fact that votes were being cast for said office; that the total number of votes cast in said county at the election of 1894 was 12,060; that there were cast for Zara Wilson for county judge 1,663 votes, and there were cast for relator 4,746 votes; that said vote was duly canvassed and the relator declared elected, and the certificate of election issued to him; that the relator executed a good and sufficient official bond and took the oath of office, which was duly indorsed upon said bond; and that the county board, in pursuance of a writ of *mandamus* issued from the district court, within due time approved said bond; that relator was eligible to the office of the county judge. It is further charged that at the time proceedings were brought one Joseph Wurzburg was temporarily discharging the duties of county judge by appointment by the county board

during the temporary absence and disability of Lansing. Judgment of ouster was prayed against Lansing and Wurzburg. The district court sustained a general demurrer to the information and entered judgment for the respondents.

The first question presented by the record, and the question of chief importance in the case, is whether the failure of Lansing to present his bond within the time provided by law deprived him of the right to the office. The statutes bearing upon the subject are as follows:

Compiled Statutes, chapter 10:

"Sec. 5. Official bonds, with the oath indorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election on or before the first Thursday after the first Tuesday in January next, succeeding the election; of all appointed officers within thirty days after their appointment; of officers elected at any special election, and city and village officers, within thirty days after the canvass of the votes of the election at which they were chosen.

"Sec. 7. The official bonds of all county, precinct, and township officers shall be approved by the county board.

* * * All such bonds shall be filed and recorded in the office of the county clerk. * * *

"Sec. 15. If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office.

"Sec. 17. When the incumbent of an office is re-elected or re-appointed he shall qualify by taking the oath and giving the bond as above directed; but when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property; and when it is ascer-

tained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified."

Compiled Statutes, chapter 26:

"Sec. 101. Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. 5. His ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to [be] exercised, or for which he may have been elected. 6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto. 7. A forfeiture of the office as provided by any law of the state. 8. Conviction of any infamous crime, or of any public offense involving the violation of his oath of office. 9. The acceptance of a commission to any military office, either in the militia of this state, or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days."

Lansing in 1893 was elected as his own successor, and section 17 is, therefore, applicable to the case. The effect of this section is to require that one who is re-elected to an office shall qualify by taking a new oath and giving a new bond "as above directed;" that is, as directed in regard to officers for the first time elected, by the former provisions of the chapter in which section 17 appears. This requires conformity with the provisions of sections 5, 7, and 15 above quoted. The object of section 17 was manifestly to place one re-elected to an office, so far as qualifying for the

office is concerned, upon the same footing as one for the first time elected. Therefore sections 15 and 17 must be read together as if section 17 read "When the incumbent of an office is re-elected or re-appointed, he shall qualify by taking the oath and giving the bond as above directed. And if any incumbent of an office re-elected thereto shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant." The provision for vacancy because of the failure to file the bond within time is not repugnant to the provisions of section 101 above quoted. It is practicable to construe the two sections together, and they should, therefore, be so construed, being *in pari materia*, and not conflicting. Section 101 provides for nine cases of vacancy, all but one contemplating events happening after the induction of the officer into office. Section 15 adds another cause of vacancy, relating to the failure of the person elected to comply with the conditions precedent to his induction. A difference in the language of these two sections is important, and it may be well at this point to call attention thereto. By section 101 it is simply provided that the office "shall be vacant upon the happening of either of the following events." By section 15 it is provided that a failure to have the bond approved and filed within the time limited by law shall "*ipso facto*" create a vacancy.

It is contended by the relator that by virtue of section 15 Lansing's failure to have his bond approved and filed within the time provided by law of itself created a vacancy in the office; that by such failure Lansing lost his right to the office and was not reinvested with the right by the subsequent approval of his bond. By the respondents it is contended that the provisions of section 15 are not self-executing; that, so far as the time for filing the bond is concerned, the statutes are directory only; that Lansing, notwithstanding his default, had a defeasible title, and that

the subsequent approval of his bond was a waiver of his default and rendered his title indefeasible. The application of the statute to all officers renders the question of considerable general importance, and we have, therefore, sought light upon the construction of the act from the decisions of other courts with relation to statutes analogous in their object.

In some of the cases cited in the respondents' brief, or in opinions referred to in that brief, the expressions on the subject are entirely *obiter*. Thus, in *Creighton v. Commonwealth*, 83 Ky., 142, the person elected had never made any attempt to qualify, and what was said in regard to irregular qualification was entirely foreign to the case. In *State v. Hadley*, 27 Ind., 496, the question was not as to the effect of a failure to file the bond within time, but as to the event from which the time began to run, and the court held that properly computed it had not expired when the bond was filed. *State v. Ring*, 29 Minn., 78, was a prosecution of a treasurer for embezzlement for not paying over moneys to a successor in office. A resolution appointing the successor attached to the appointment a condition that bond should be given in two days. The bond was not given for three days. The court held that the county commissioners could waive and had waived the performance of this condition, but as the condition was created by their own resolution and not by statute, this case throws no light on the present. *State v. Colvig*, 15 Ore., 57, was a case arising under a statute which contained no provision fixing the time for filing the oath of office. The court held that a fair construction of the law gave the officer some time after his term began to file the oath and then added that statutes fixing the time are generally construed as directory, an observation purely theoretical, inasmuch as there was no statute fixing the time.

There is another class of cases which were suits on official bonds tendered and approved after the statutory time.

The best considered of these cases hold the bond valid, not because the statute fixing the time was directory merely, but because the officer became a *de facto* officer, or because the officer and his sureties were estopped from asserting the invalidity of the bond, they having tendered it and it having been accepted and the officer having acted under it. Such cases are *Sprowl v. Lawrence*, 33 Ala., 674; *State v. Porter*, 7 Ind., 204; *Crawford v. Howard*, 9 Ga., 314; *State v. Toomer*, 7 Rich. [S. Car.], 216; *Dunphy v. Whipple*, 25 Mich., 10; *Williams v. School District*, 21 Pick. [Mass.], 75; *McElhanon v. Washington County*, 54 Ill., 163; *City of Chicago v. Gage*, 95 Ill., 593. All these cases did not go upon the ground stated. Thus, *State v. Porter*, *supra*, merely says that the failure of the officer to give bond within the time provided "did not necessarily vacate his office," an ambiguous expression which is not elucidated, as we shall hereafter see, by the later decisions of the Indiana court. An analysis of the opinion in *State v. Toomer*, *supra*, shows that the court gave three reasons for holding the bond valid: First, that its invalidity was no defense to sureties; second, that the principal was an officer *de facto*; and third, that the statute was directory only. But the opinion cites three prior South Carolina cases. (*Kottman v. Ayer*, 3 Strob., 92; *McBee v. Hoke*, 2 Spears, 138*; *Hampton v. Levy*, McCord, 107.) The first two of these cases went upon the ground that the officer was one *de facto*, and the last upon the ground that the parties to the bond were estopped to deny its validity. Having given two sufficient reasons, founded upon prior adjudications, for the result reached, the superadded statement that the statute was directory thereby lost much of its force. The Illinois cases are distinctly placed on grounds other than those taken in most of the cases in this class. In *McElhanon v. Washington County* the court said that the statute authorized a new bond to be given whenever the original became insufficient, and that it appearing that the bond sued on was given at a time later than the

original bond should have been filed, it would be presumed that it was a new bond given under the statute to take the place of the original. This case, therefore, throws no light on the present. In *City of Chicago v. Gage* the statute under consideration provided that if the bond were not given in the time provided by law the person elected "shall be deemed to have refused the office;" and another provision of the statute was that in such event the office "shall become vacant." The court in this case based its decision upon the ground that the statute was directory, doing so chiefly from considerations of public policy and reluctance to enforce what the court considered a forfeiture. We are of the opinion that the decision would rest on safer ground if it proceeded upon the reasons given in a majority of such cases; but as the court saw fit to rest it upon the directory character of the statute, it is a case which would support the contention of respondents were the statutes alike. But actions upon bonds given out of time and direct proceedings to oust an officer for failing to qualify according to law present very different questions for consideration. Before leaving this class of cases we wish to observe that in a number of them the court held the bond invalid as an official bond, but sustained it as a voluntary bond, and wherever this course was adopted the decisions tend rather to sustain the position of the relator than that of the respondents.

A few of the cases were collateral attacks by impeaching the validity of the acts of an officer who qualified too late. *Stokes v. Kirkpatrick*, 1 Met. [Ky.], 138, was a motion to quash a summons on this ground. The statute provided that the failure to qualify as required by law "shall be a misdemeanor, and on conviction such officer shall be removed from office by judgment of the court where the conviction is had." Another provision of the statute was that in such case the office "shall be considered vacant." The court held, construing these two provisions together, that

the office only became vacant on conviction and judgment. We do not see how a different result could be reached under such a statute; but it has no application to this case. Of a very different character is the case of *Clark v. Ennis*, 45 N. J. Law, 69. The statute provided that if such officer "shall neglect, refuse, or be unable to give bond with sureties as aforesaid, agreeably to the directions of this act, at the time or times herein limited, the office of such sheriff shall immediately expire, and be deemed and taken to be vacant, and if such sheriff shall thereafter presume to execute the office of sheriff, then all his acts and proceedings done under color of office shall be absolutely void." The court, reviewing decisions under different statutes, reached the marvelous conclusion that the office did not expire and that the sheriff's acts and proceedings were not void. The constitutionality of the statute was not doubted, and the case is perhaps the clearest instance which has ever fallen within the writer's observation of a court's undertaking by judicial interpretation to repeal a valid legislative enactment, because in the judgment of the court a different law would be more desirable. Such authority we emphatically refuse to follow.

Still another class of cases is illustrated by *Ex parte Candee*, 48 Ala., 386, and *State v. Carneall*, 10 Ark., 156. These were cases whereby it was sought to oust an officer who had already been regularly inducted into office, and they proceed upon the ground that an office so acquired is a vested property right of which the incumbent cannot be divested without due process of law. That the court in each case took this view is evident from later decisions of the same states. Thus, *State v. Tucker*, 54 Ala., 205, expressly overrules *Ex parte Candee*, as well as *Sprowl v. Lawrence*, *supra*, in so far as those cases expressed the opinion that the failure to qualify within time operated as a defeasance and not as a condition precedent, and *Falconer v. Shores*, 37 Ark., 386, distinguished *State v. Carneall*, on

the ground that the latter was a proceeding to oust an officer already inducted, while *Falconer v. Shores* raised the question as to whether the officer had ever been properly inducted; the court holding that he had not, because he did not tender his bond within the time provided by law, that this was a condition precedent to his taking office, and that he had thereby lost all right thereto.

We now reach a class of cases more directly in point, and several of these, if we disregard the peculiar phraseology of our own statute, sustain the respondent's contention. *State v. Churchill*, 41 Mo., 41, was an action in *quo warranto*. The statute is not cited, but, as nearly as the writer can ascertain, the statute then in force required the giving of a bond in ten days, but contained no provision for the consequences of a failure to give it; while another section provided for the renewal of bonds and for a forfeiture of the office for failure to properly renew them. The court held that the provision in regard to original bonds was directory only, and we can see no fallacy in that conclusion under such a statute. Other Missouri cases are to the same effect. *Worley v. Smith*, 81 N. Car., 304, was also *quo warranto*, and the court held that the incumbent remains legally in office until ousted by judicial proceedings. The statute is not quoted, but from the language of the court it would seem that its provisions were manifestly to that effect, although the court does not intimate what the proceedings should be, and unless the statutes provided special proceedings, we cannot see how they could be brought unless by *quo warranto*, as was attempted. *State v. Ruff*, 4 Wash., 234, was an action in the nature of *quo warranto*. The statute provided that for a failure to qualify within time the office "shall become vacant." The court said that "courts abhor forfeitures," and that therefore the statute should be construed as directory, or, to use the precise language of the court, "declaratory," but adds that if the statute had provided that the office should "*ipso facto*" become va-

cant, a different question would be presented. From the decision two judges out of five dissented; and to courts inclined to adopt the policy of construction followed by the New Jersey court in *Clark v. Ennis*, we would commend a perusal of the dissenting opinion of Judge Dunbar in *State v. Ruff*, who said: "Nor do I think that a plain statutory enactment, setting forth specifically circumstances under which an office becomes vacant, should be construed out of existence by the mere statement of the theoretical rule that 'forfeitures are abhorred by the courts.' What the courts abhor should be of very little consequence. The vital question is, what did the legislature intend? I think it is an excellent idea for courts to give to statutory language its plain and ordinary meaning." In *Commissioners of Knox County v. Johnson*, 124 Ind., 145, there was an appeal from the refusal of the commissioners to accept a bond tendered out of time. The statute provided that on a failure to present the bond within time the office "shall immediately become vacant." The opinion of the court, written by Judge Elliott, is to the effect that the statute was directory, and not mandatory, and that the failure to file the bond within time did not vacate the office. On this point the court cites, among other cases, *State v. Porter*, 7 Ind., 204, and *Mayor of City of Indianapolis v. Geisel*, 19 Ind., 344. We have already commented upon *State v. Porter*. *Mayor of City of Indianapolis v. Geisel* grew out of the following facts: Geisel and others had been elected councilmen from the eight and ninth wards of Indianapolis. They took the oath of office and presented their certificates of election. Thereupon a motion was made in the council to exclude them, to which an amendment was offered as follows: "That as too many democrats lived in said wards (eighth and ninth), the judiciary committee be directed to report an ordinance repealing the ordinance creating said wards." This motion, with the amendment, was carried. The circuit court issued a mandate commanding the council to admit

State v. Lansing.

the excluded members, and the supreme court affirmed the judgment in a brief opinion discussing no question of law. The syllabus of the case is as follows: "There is no point of interest decided herein, but the facility with which objects may sometimes be attained by the 'law's delay' is well illustrated." The other Indiana cases cited by Judge Elliott were cases decided without an opinion, simply referring to the last case. On this slender basis of authority Judge Elliott based his opinion, and the court its decision, in *Commissioners of Knox County v. Johnson*, apparently forgetting and in nowise referring to the fact that in *State v. Johnson*, 100 Ind., 489, the court had unanimously held, Judge Elliott himself writing the opinion, that, under a statute providing that for a failure to present his bond within the time limited the "office shall become vacant," the person elected lost all right to the office and could not thereafter present his bond and require its approval. With all due respect to the Indiana court we must protest that such a line of decisions does not appeal to one's reason. Of all the cases cited in support of the position of the respondents, that most nearly in point is the case of *Atchafalaya Bank v. Dawson*, 13 La., 497. The charter of the bank provided that for a failure or refusal to pay specie for the period of ninety days, the charter should "become *ipso facto* forfeited." The court held that this statute did not mean what it said; that the words "*ipso facto*" lent no force to the act, and that the failure to pay specie was only a ground of forfeiture and did not work a forfeiture; but the court seems to have been moved to a decision of this case by the fact that it was an attempt by collateral proceedings to question the existence of a corporation and did not consider that its decision had any bearing on a case like the present, because *State v. Beard*, 34 La. Ann., 273, was a case precisely like the case we are considering, the statute providing that the failure to qualify within the time provided "shall operate a vacation of such office," and the

court held that a failure to so qualify within the statutory time forfeited all rights to the office, that the office by that fact became vacant and an appointment might be made to fill the vacancy, citing *Hurford v. City of Omaha*, 4 Neb., 336.

So far as the cases we have already referred to offer any support for the position of the respondents, they are met by the following cases holding that a failure to qualify within time is a failure to perform a condition precedent to the right of taking the office. For the sake of brevity we omit a full quotation of the statutes and quote only the words which follow what is, in substance, the premise that "a failure to qualify within the time provided," etc.: "Shall forfeit his right to the office." (*Falconer v. Shores*, 37 Ark., 386.) "Becomes vacant." (*People v. Taylor*, 57 Cal., 620; *People v. Perkins*, 85 Cal., 509; *People v. Shorb*, 100 Cal., 537.) "Shall become vacant." (*State v. Matheny*, 7 Kan., 327.) "Vacates his office." (*State v. Tucker*, 54 Ala., 205, overruling, on this point, *Sprowl v. Lawrence*, 33 Ala., 674, and *Ex parte Candee*, 48 Ala., 386, relied on by respondents.) "Deemed vacant." (*In re Office of Attorney General*, 14 Fla., 277.) "Shall be vacant." (*State v. Johnson*, 100 Ind., 489.) "Shall operate a vacation of office." (*State v. Beard*, 34 La. Ann., 273.) "Shall thereby become vacant." (*Bennett v. State*, 58 Miss., 556.) "Shall immediately become vacant." (*People v. Common Council of City of Brooklyn*, 77 N. Y., 503.) "Before entering upon the discharge of any functions as officers of this state, must take and subscribe the following oath." (*Childrey v. Rady*, 77 Va., 518; *Owens v. O'Brien*, and three other cases, 78 Va., 116.)

It will thus be seen that the overwhelming weight of authority, under statutes much less mandatory than our own, is to the effect that where a time is prescribed within which one in order to be inducted into an office must take the oath or file a bond, the taking of the oath or the filing

of the bond is a condition precedent to the right to enter upon the office, and that the right is absolutely lost by a failure to perform the condition within the time limited. There is no question involved in this case as to whether the holding of an office is a vested property right. It is not here contended that there is anything in our constitution which prohibits the legislature from requiring an oath of office or the giving of a bond as a condition precedent to the exercise of official functions. The only question is whether the legislature has required it. Were the statute much less distinct in its terms, and were we to follow the general current of authorities elsewhere, we would be obliged to hold that such a condition precedent did attach; but evidently for the purpose of permitting no room for doubt upon the question, the legislature has adopted language which, as strongly as any language could, conveys the idea that the bond must be filed within the time limited or the person elected loses all right to the office. The language of the statute is that a neglect to have the bond approved and filed within the time limited shall "*ipso facto*" vacate the office. If possible, in construing a statute every word thereof must be given effect, and if we give the term "*ipso facto*" any effect it must be in the way indicated. The term has in law a very well defined signification. Rapalje's Law Dictionary defines it "by the very act itself." Anderson's Law Dictionary defines it "by the mere fact." Bouvier defines it "by the fact itself. By the mere fact, a proceeding *ipso facto* void is one which has not *prima facie* validity but is void *ab initio*." Possibly a closer translation of the Latin term would be "by the fact itself," but under any possible construction of the term, if we are to give it any force, it means that the failure to file the bond within the time limited shall of itself operate a vacation of the office, and not that a judgment of a court based upon that failure shall be required to operate such vacation. When the question was first proposed to us, we recalled to our minds the use of

the term in discussions of the law in relation to forfeitures, for the purpose of distinguishing forfeitures which took place because of office found from forfeitures *ipso facto*,—that is, by reason of the event creating the forfeiture independent of judicial action; but the generally accepted signification of the term, coupled with its use in cases like the present, renders it unnecessary for us to investigate the authorities from the standpoint suggested. Among the cases presenting questions precisely like that before us, in which the term "*ipso facto*" is used in the sense of causing the failure to file the bond itself to vacate the office without the necessity of any judicial proceeding to accomplish that object, are the following: *State v. Beard*, 34 La. Ann., 273; *State v. Peck*, 30 La. Ann., 280; *State v. Cooper*, 53 Miss., 615; *Bennett v. State*, 58 Miss., 556; *Kearney v. Andrews*, 10 N. J. Eq., 70; *People v. Carrique*, 2 Hill [N. Y.], 93; *People v. Nostrand*, 46 N. Y., 381; *Foot v. Stiles*, 57 N. Y., 399; *People v. Green*, 58 N. Y., 295; *State v. Ruff*, 4 Wash., 234; *King v. Godwin*, Douglas [Eng.], 398; *Milward v. Thatcher*, 2 T. R. [Eng.], 81. In each of the foregoing cases the term was used, and precisely in this sense, and these cases cover most of the states which, under different statutes, have adopted the directory theory, implying clearly that the use of this particular term in the statutes of those states would have compelled a different result and one in accordance with our conclusion and with the weight of authority elsewhere. We therefore think that whether the result be reached by a review of the authorities or by an inspection of the statute itself, our legislature has declared in unmistakable terms that where an official bond is required it must be filed within the time provided by law, and that its filing within time is a condition precedent to the induction into office of the person elected; that Lansing did not present his bond within time; that he failed thereby to perform a condition precedent, and that he thereby lost all right to claim the office

unless his right was saved by a constitutional question, which next arises for consideration.

The constitution (article 3, section 20) provides: "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind." It is contended that the expression of these events as creating vacancies is the exclusion of all others, and there are a few decisions in other states lending color to the argument. It would be a sufficient answer to this contention to say that this court has always carried in view the principle that the state constitution is not to be considered as a grant of power, but that its provisions are purely restrictive and that legislation is valid unless prohibited by the state or the federal constitution. Therefore, in such cases as the present, the maxim "*Expressio unius est exclusio alterius*," is not applicable, and the legislature may adopt any provision not prohibited by the constitution. (*State v. Lancaster County*, 4 Neb., 537; *State v. Dodge County*, 8 Neb., 124; *State v. Bean*, 16 Neb., 681; *Shaw v. State*, 17 Neb., 334.) To put it differently, the constitutional provision quoted creates a vacancy upon the happening of any of the events covered by the provision, and the legislature would be prohibited by that provision from enacting any law whereby such an event would not create a vacancy. But it is not prohibited from enacting that vacancies shall be otherwise created. But aside from this, section 20, article 3, of the constitution manifestly refers to events occurring after an induction into office. The case presented is not one of that character. It is not the case of ousting one already legally inducted into office for events occurring after his induction, but, on the contrary, it is questioning the right of one to claim an office in the beginning. The distinction has already been alluded to, but throughout it should be borne in mind that we are here discussing the right of a person to claim a term of

office, and not the right of another or of the public to oust one from a term already legally begun.

The next question which arises is as to the right of the relator himself to claim the office. Section 21, article 6, of the constitution, provides: "In case the office of any judge of the supreme court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be elected and qualified, and such successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened. Vacancies in all other elective offices provided for in this article [which includes the office of county judge] shall be filled by election, but when the unexpired term does not exceed one year, the vacancy may be filled by appointment, in such manner as the legislature may provide." Therefore, in case of vacancy in the office of the county judge, the constitution does not provide for filling the vacancy, but the general provision applies, that it shall be by election; provided, however, that where the unexpired term does not exceed one year the vacancy may be filled by appointment as the legislature may provide. The legislature has provided as follows: "Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court; in all other state and judicial district offices, * * * by the governor. * * * In county and precinct offices, by the county board." (Compiled Statutes, sec. 103, ch. 26.) "Appointments under the provisions of this chapter shall be in writing and continue until the next election at which the vacancy can be filled, and until a successor is elected and qualified." (Sec. 105.) "Vacancies occurring in the office of county judge * * * shall be filled by appointment as provided in section one hundred and three." (Sec. 107.) Here the unexpired term did exceed one year and, therefore, was to be filled by elec-

tion. Whether it would have been proper, under existing laws, to have filled the vacancy by appointment until the election is not a question involved in this case, and is one which we do not consider, because, conceding that a vacancy existed which should have been filled by appointment provisionally, the failure of the proper officers to make the appointment would render it none the less necessary to fill the office by election at the succeeding general election. There is, so far as we can find, no provision for a special election in such case, and if there were one, the failure of the proper officers to call such special election would not deprive the electors at the next general election of the right or of the duty of filling the office.

This brings us to the final question—the validity of the election in so far as it may be affected by the fact that the office of county judge was not one included in the notice of election for 1894. In *State v. Skirving*, 19 Neb., 497, which, by the way, is also in point on the principal question presented, it was said that the exercise of the right to fill such a vacancy did not depend on the notice or want of one. That it was generally understood by the electors of the county that a vacancy existed and they sought to fill said vacancy, nearly all having cast their ballot for one of the candidates named. It was therefore held that the election was valid, but the court disclaimed any intention of passing upon the question as to the validity of such an election had but a small percentage of the voters participated therein. In *State v. Thayer*, 31 Neb., 82, the court allowed a writ of *mandamus* to compel the canvass of the votes under similar circumstances. The governor had not included in his proclamation of the election the filling of the office in question. The court held that the provision in regard to proclamation was one of convenience for the purpose of calling attention to the contingency, but said: "It is not believed that it touches the foundation of the right and power of the people under the statute to fill such

vacancy at the general election designated by law," and added thereto the statement that "whether the people had executed their right doubtless may in some instances depend upon the fact of their having actual notice of the existence of a vacancy." In *State v. Van Camp*, 36 Neb., 91, *State v. Thayer*, *supra*, was approved. This case related to the regularity of a nomination under what is called the "Australian Ballot Law," it being claimed that the nomination was irregular because one county was not included in the call for the convention and was not represented. The court said it would not "so construe the law as to disfranchise the voters of that county for any such irregularity." Here the information alleges that it was generally known that the relator and one Wilson were candidates for the office of county judge to fill the vacancy and that together they received the votes of more than half the voters voting at the election. The case therefore falls within the rule in the foregoing decisions, and the election was valid, notwithstanding the fact that the filling of this office was not one of the objects included in the notice of election.

What has been said in this opinion relates to the case under consideration as presented by the record, and to the statutes brought under consideration. We do not wish to be understood as questioning the propriety of those decisions which hold provisions of the general character referred to directory rather than mandatory, where the language is ambiguous or fairly susceptible of that interpretation. We are, however, compelled, in order to avoid judicial legislation, to reach the conclusion already indicated in this case. Whether or not the law is wise is a question with which the court has nothing to do. The legislature has declared it, its constitutionality has not been questioned, and our sole office is to determine the legislative intent. The consequences are matters for legislative consideration and not for the consideration of the court.

REVERSED AND REMANDED.

NORVAL, C. J., and RAGAN, C., dissenting.

It is evident that the question whether Lansing's failure to execute, have approved, and filed his official bond by the first Thursday after the first Tuesday in January, 1894, created a vacancy in the office of county judge, must depend upon the construction of the following language found in section 15, chapter 10, Compiled Statutes: "His office shall thereupon *ipso facto* become vacant." What is the meaning of the expression "shall thereupon *ipso facto* become vacant"? We think a fair construction of this phrase is that "his office shall at that time, by reason of such neglect, become vacant." Is this section of the statute mandatory or directory merely?

In *State v. Matheney*, 7 Kan., 327, the statute under consideration provided: "The bond and oath of the county clerk must be filed with the treasurer of the county," etc. "Every county office shall become vacant upon the refusal or neglect of the officer to deposit his oath and bond of office within the time prescribed by law." Matheney was elected county clerk, executed his bond, and took the oath of office required by law, and within the time required by law, and entered upon the duties of his office, but neglected to deposit his oath and bond with the county treasurer within the time prescribed by the statute, and the court held that the failure of Matheney to deposit his bond and oath of office with the county treasurer of the county within the time required by law—twenty days after his term of office began—created a vacancy in the office. The court said: "There can be no mistake as to the meaning of these statutes. Whatever may be the rule, independent of the statute, the plain provision of the law is, that not only a refusal, but a neglect simply, to deposit the official oath and bond within the time prescribed vacates the office. We may not add to nor take from the law. It may seem a matter of trivial importance whether a bond and oath, executed and

taken, are filed within twenty or thirty days; but that is a matter for the legislature to consider. They have power to establish a rule. Having established it, our plain duty is to enforce it."

A statute of California provided: "An office becomes vacant on the happening of either of the following events before the expiration of the term: * * His [the officer elect's] refusal or neglect to file his official oath or bond within the time prescribed." (Political Code of California, sec. 996.) Taylor was duly elected sheriff, but neglected to file his official oath or bond within the time prescribed by the statute and the supreme court of that state in *People v. Taylor*, 57 Cal., 620, held that the neglect to file the bond within the time prescribed created a vacancy in the office.

The charter of the city of Brooklyn, New York, provided that if an alderman of said city should be elected to and accept any other public office, "his office as said alderman shall immediately become vacant." One O'Reilly was an alderman in the city of Brooklyn, and while holding that office was elected to and accepted the office of congressman of the United States, and the court of appeals of New York, in *People v. Common Council of the City of Brooklyn*, 77 N. Y., 503, held that O'Reilly's acceptance of the office of congressman created a vacancy in the office of alderman. The court, in effect, held that the quoted statutes were mandatory.

There are other cases holding that such a statute as the one we have under consideration is mandatory; but we think, however, that the weight of authority is to the effect that all such statutes are directory.

A statute of New Jersey provided that sheriffs should renew their bonds in November annually; and "That if any sheriff * * * shall neglect, refuse, or be unable to give the bond with sureties as aforesaid * * * at the time or times herein limited, the office of such sheriff

shall immediately expire and be deemed and taken to be vacant." (Revision of New Jersey, p. 1099, sec. 10.) The statute further provided: "All such acts and proceedings done [by a sheriff] under color of office [after having neglected or refused to renew his bond] shall be absolutely void." The supreme court of New Jersey, in *Clark v. Ennis*, 45 N. J. Law, 69, construing these statutes, said: "It is clear, I think, both upon reason and authority, that a statute declaring an office vacant for some act or omission of the incumbent after he enters upon his duties does not execute itself;" and held, in effect, that the statute was directory.

The charter of the city of Chicago provided that all city officers who were required to give bonds for faithful performance of official duties should "file their bonds with the city clerk within fifteen days after their election," etc. The charter further provided that when bonds should not be filed with the city clerk within fifteen days after the official canvassing of the votes, "the person so in default should be deemed to have refused said office, and the same should be filled by appointment as in other cases;" and in case a bond so filed should not be approved and a satisfactory bond should not be filed within fifteen days after such disapproval, the person so in default should "be deemed to have refused said office, and the same should be filled as above provided;" and further, the charter made it "the duty of the clerk to notify all persons elected to office of their election, and unless such persons should respectively qualify within fifteen days thereafter the office should become vacant." It was held in *City of Chicago v. Gage*, 95 Ill., 593, that these provisions, in respect to the time within which official bonds were required to be filed, were not mandatory, but merely directory. The municipal authorities were empowered, in their discretion, to declare a vacancy, or to waive the default as to the mere time of filing the bonds, and to accept and approve it when afterwards

filed. The mere default in that regard would not, of itself, operate to vacate the office. The court said: "The position is, that the provision requiring a bond to be filed by the treasurer elect within fifteen days after the official canvass has been declared is mandatory, and that a failure to file the bond within the time *eo instanti*, upon the termination of the time, absolutely vacates the office. It is insisted, on the contrary, that the sections of the charter on this subject taken together were intended merely to empower the mayor and council, in their discretion, to declare a vacancy and appoint a successor, or to waive the default as to the mere time of filing bond, and to accept and approve it when afterwards filed; therefore a failure to file in time does not of itself annul or avoid the right or title to the office, but merely renders it voidable or defeasible. That if the officer files his bond strictly in time, his right and title to the office are indefeasible. If he files it afterwards, and it be accepted and approved, his right and title thereupon become equally indefeasible. This latter seems a reasonable construction, and is one which we are disposed to adopt. Gage derived his title to the office from election. The law does not favor forfeitures, and 'in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction.'"

A statute of Washington provided: "Every office shall become vacant upon the happening of either of the following events: * * * His [the officer elect's] refusal or neglect to take his oath of office within the time prescribed by law." The supreme court of that state in *State v. Ruff*, 29 Pac. Rep., 999, construing this statute, held that the failure of the officer to take his oath of office within the time prescribed by law did not work a forfeiture of his right to the office, but simply authorized the proper authorities to declare the office vacant, and fill it by appointment. (See, also, *State v. Justices of the County Court*, 41 Mo., 44; *State v.*

County Court of Texas County, 44 Mo., 230; *Foot v. Stiles*, 57 N. Y., 399.)

A statute of Indiana provided: "County school superintendents, within thirty days from the issuing of the proclamation by the governor announcing the making of a contract for furnishing school books, and every county superintendent hereafter elected before he enters upon his official duties, shall enter into a special bond, and upon the failure of any county school superintendent to give such bond his office shall become immediately vacant." A county school superintendent elected after the passage of the act gave a general bond and entered upon his duties, but failed to give a special bond within thirty days after his election. In *Commissioners of Knox County v. Johnson*, 24 N. E. Rep. [Ind.], 148, the supreme court of that state, construing this act, said: "But it by no means results from the construction we have given the statute that the appellee lost his title to the office to which he was elected and into which he had been legally inducted. It is held by our own and other courts that statutes requiring official bonds to be filed within a designated time are directory and not mandatory. Upon this question the authorities are harmonious." The court then cited a number of authorities and continued: "This rule is carried very far, for it is held, without substantial diversity of opinion, that unless the statute makes the filing of a bond within a limited time a condition precedent to the right to the office, a failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy."

A statute of Louisiana provided that for the failure or refusal of a bank to pay specie for the period of ninety days its charter should become *ipso facto* forfeited. In construing this statute the supreme court of that state, in *Atchafalaya Bank v. Dawson*, 13 La., 497, said: "It would certainly be difficult to find in our language stronger terms, or to combine them with more force, for the purpose

of expressing the consequences of an act. * * * It is provided * * * that on the suspension or refusal of payment in specie for more than ninety days, the charter shall be *ipso facto* forfeited and void. * * * I do not understand the words '*ipso facto*' as having any other import than the corresponding term 'by the effect of the act,' made use of in the Code."

Respondent's case falls within the principle of these last cited cases, and controlled by the weight of authority we reach the conclusion that said section 15 is directory, and not mandatory, in so far as its provisions are under consideration here; that the section is not self-executing; that the execution and filing of an official bond by respondent for his second term of office was not a condition precedent to his right to enter upon and to discharge the duties of his office for the second term; that since respondent was already in office as county judge, was re-elected to succeed himself, and since he held under his first election and qualification until his successor should be elected and qualified (Compiled Statutes, sec. 104, ch. 26), he held office under his second election by a defeasible title from the time of his neglect to execute and file his official bond; that is, he held the office by a title capable of being divested at any time by the proper legal authorities; and that the execution and filing of his official bond by respondent, coupled with the neglect and failure of the proper authorities to declare the office vacant or to take any steps to that end prior to the time that respondent did execute and file his bond, saved the forfeiture incurred, and barred and precluded a subsequent judgment that the office was vacant by reason of respondent's default.

N. N. BRUMBACK ET AL. V. GERMAN NATIONAL BANK
OF BEATRICE.

FILED DECEMBER 7, 1895. No. 6228.

1. **Jurors: CHALLENGE: REVIEW.** It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges.
2. **Negotiable Instruments: PRINCIPAL AND SURETY.** When a note is signed by the principal and four sureties, an agreement between the principal and such sureties that it is not to be delivered to the payee until a certain other person signs as surety, which condition is not complied with, constitutes no defense, unless the payee had notice or knowledge of the agreement at the time of the delivery, or of facts which should have induced inquiry.
3. **Instructions: REVIEW.** It is not reversible error to refuse to give an instruction not applicable to the evidence, or one which has been covered by instructions given by the court on its own motion.
4. **Judgment for Plaintiff in Action on Note.** *Held*, That the evidence sustains the verdict.
5. **Trial: VERDICT.** It is not error to refuse to submit a form of verdict to the jury which is not responsive to all the issues in the case.
6. **Verdict: OBJECTIONS TO FORM.** Objections to the form of a verdict should be made in the trial court at the time of its rendition, to be of any avail in this court. *Roggenkamp v. Hargreaves*, 39 Neb., 540, followed.

ERROR from the district court of Gage county. Tried below before BUSH, J.

J. E. Cobbey, for plaintiffs in error.

George A. Murphy, contra.

NORVAL, C. J.

This action was brought by the German National Bank of Beatrice against the plaintiffs in error upon a promissory note, of which the following is a copy:

"\$1,500. BEATRICE, NEB., May 1, 1892.

"Sixty days after date I, we, or either of us, promise to pay to the German National Bank, of Beatrice, Neb., or order, fifteen hundred dollars, value received, payable at the German National Bank in Beatrice, Nebraska, with interest at the rate of 10 per cent per annum from due.

"BEATRICE RAPID TRANSIT & POWER Co.,

"By N. N. BRUMBACK, *Pres.*

"L. E. SPENCER, *Sec'y.*

"L. E. SPENCER.

"N. N. BRUMBACK.

"S. K. DAVIS.

"CHAS. L. SCHELL."

The petition contains the usual averments. Two answers were filed, one by the Beatrice Rapid Transit & Power Company, and the other by the individual defendants. The answer of the corporation defendant avers, in effect, that it executed the note upon the understanding and agreement that plaintiff was to secure the signature of one G. M. Johnston to the note, and that the secretary and president of said defendant had no authority or power to sign said note upon any other condition, which fact was known to the plaintiff and its managing officer; that the note was only to be delivered upon Johnston's signature to said note being obtained by said plaintiff, and that said condition has never been fulfilled or carried out. The individual defendants answer setting up that they each signed the note as surety, and upon the express understanding that it should not be delivered and was not to be a binding obligation until the same was signed by each of the individual defendants and the said G. M. John-

Brumback v. German Nat. Bank of Beatrice.

ston; that the name of the latter was never procured, nor was the instrument ever delivered. The reply denies each averment in the answers contained. Upon a verdict being returned in favor of the plaintiff for the full amount of the note, the corporation defendant filed a motion for a new trial, and the individual defendants joined in another motion for a new trial upon substantially the same grounds, which motions were overruled, and judgment entered upon the verdict. Two petitions in error were filed, one by the corporation defendant, and one by the remaining defendants.

The first three assignments of error relate to the refusal of the court to excuse the jurors Fred Hallingsworth, M. S. Glass, and G. W. Martin, for the reason the *voir dire* examination of each disclosed that he was indebted to, and did business with, the plaintiff. Whether these persons were disqualified from sitting as jurors in the cause we will not stop to determine. Conceding, for the purposes of this case, that they were incompetent jurors, still a reversal cannot be had upon that ground, for two reasons: First, the record fails to show which party challenged the jurors for cause or excepted to the ruling thereon. If the challenges were interposed by the plaintiff, and the jurors were retained over its objection and exception, clearly the defendants are not in position to have the decision of the court thereon reviewed here. Again, it does not appear that the defendants either exhausted all, or availed themselves of any, of their peremptory challenges. For this latter reason alone, the error, if any, in the overruling of the challenges for cause is without prejudice. (*Palmer v. People*, 4 Neb., 68; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332; *Curran v. Percival*, 21 Neb., 434; *Nowotny v. Blair*, 32 Neb., 175; *Blenkiron v. State*, 40 Neb., 11; *Jenkins v. Mitchell*, 40 Neb., 664.)

The next three assignments, the fourth, fifth, and sixth, are as follows:

"4. The court erred in compelling defendants to exhaust their peremptory challenges in excluding the three jurors above named.

"5. The court erred in restricting defendants to three peremptory challenges.

"6. The court erred in forcing the defendants to exhaust their peremptory challenges in removing from the jury men who were under financial obligations to plaintiff."

Not one of the foregoing assignments is well taken, inasmuch as there is nothing in the record to indicate that the defendants were limited by the court to three or any other number of peremptory challenges, or that they challenged a single juror peremptorily. Error cannot be presumed, but must affirmatively appear, in order that a reviewing court may take cognizance thereof.

Assignments 7 to 19, both inclusive, relate to the giving and refusing of certain instructions, but only three of which, seventh, ninth, and tenth, are discussed in the brief of plaintiffs in error. The others will be regarded as waived.

It is insisted that the court erred in giving the following instruction at the request of the plaintiff:

"1. The court instructs the jury that though you may believe from the evidence that the makers of the note signed the said note with the understanding and agreement that one Johnston should sign the same, and that they should not be bound on said note unless said Johnston signed also, yet, unless the plaintiff bank had knowledge of this arrangement it would not bind them or be a defense to said note, and your verdict should be for the plaintiff."

A single criticism is made upon this instruction, and that is, it is inapplicable to the facts established on the trial. As to this point, counsel for plaintiffs in error, in the brief filed, says: "The undeniable evidence is that Spencer, one of the signers of the note, was made by the bank, defendant in error, its agent to secure the signatures of the other parties to the note, so that agreements or state-

ments made to him by the signers would be binding upon the bank, whether it had actual knowledge thereof or not." We have been unable to find a scintilla of evidence from which the inference can be drawn that the bank authorized Mr. Spencer, or any one else, to procure the signatures to the note. The note in suit was given in renewal of another note of the same amount signed by all of the plaintiffs in error and one Johnston for the sum of \$1,500. All the individual signers of the note in controversy were stockholders of the Rapid Transit & Power Company. Spencer, being the secretary of the corporation, obtained the signatures to the note, and in so doing he acted for and on behalf of himself and his co-signers, and not as the agent of the payee of the note. So notice to Spencer was not notice to the bank. The debt was that of the corporation defendant, the other signers being sureties merely. The fact that it was the understanding or agreement between the makers of the paper that Johnston was also to execute the note as surety before the delivery thereof, is no defense, unless the payee had notice or knowledge of the condition at the time the instrument was accepted by the bank, and the court correctly so charged. (*Lombard v. Mayberry*, 24 Neb., 679; *Brandt, Suretyship* [2d ed.], sec. 402; *Deardorff v. Foreman*, 24 Ind., 481; *Merriam v. Rockwood*, 47 N. H., 81; *Stoner v. Millikin*, 85 Ill., 218; *Selser v. Brock*, 3 O. St., 302; *Passumpsic Bank v. Goss*, 31 Vt., 315; *Haskins v. Lombard*, 16 Me., 140.) Even though there existed such an agreement, and the bank had notice thereof, it would be no defense as to the principal maker, since its liability would not be changed by the fact that Johnston did not sign, as it had no right to look to the sureties for contribution. (*Brandt, Suretyship*, sec. 402.)

The defendants asked this instruction: "The jury are instructed that if they believe from the evidence that the note sued on was signed by the parties defendant in this action with the understanding that it was to be signed by

another party before becoming operative as a note; then they will find for the defendants." This request was given with the following modification: "If you find from the evidence that such understanding and such an agreement was made and entered into between the plaintiff and the defendants." The objection that the modification of the instruction was erroneous is, we think, fully met by what has been said in the discussion of the instruction asked by the plaintiff. The change or modification is not subject to the criticism made by the defendants below, that it was not called for by the evidence, and calculated to mislead the jury. The instruction as changed was not only applicable to the case, but considered in connection with the remainder of the charge fairly submitted to the jury the disputed questions of fact.

Error is assigned for the refusal of the trial court to give the defendants' second instruction, which was thus: "The jury are instructed that it was proper for the signers of the note in suit to make the taker of the note their agent to secure other signatures to the note, which were to be obtained by the plaintiff, as taker of said note, before said note became operative; and if the jury believe from the evidence that such agreement was made and was not carried out on the part of the plaintiff, then they will find for the defendants." Undoubtedly, where a note is executed and delivered to the payee and by him accepted upon the promise or agreement that the instrument should be subsequently signed by another as maker, the execution and delivery would not be complete until the signature of such other person had been procured, and the jury were so informed by the charge of the court. Defendants' second request was faulty, in that it assumes as a fact that the bank was to secure other signatures to the instrument after the delivery thereof. There is no evidence that the officers of the bank so agreed. There is evidence, it is true, tending to show that one person, Mr. Johnston, was also to exe-

Brumback v. German Nat. Bank of Beatrice.

cute the note, but there is in the record testimony disputing this. So far as the instruction was correct, it was fully covered by the instructions given.

Complaint is made in the brief of the rulings of the court on the admission of testimony, but these decisions cannot be reviewed here, because of the insufficiency of the assignments relating thereto in the petition in error, the assignments being too indefinite to indicate the particular rulings claimed to be erroneous.

As to the sufficiency of the evidence to support the verdict, it is enough to say that without commenting upon the testimony at length, upon due consideration of it all, we are satisfied that there is not an entire lack of evidence to sustain the finding and judgment. There was a conflict in the testimony, but the weight to be given thereto was for the jury, and as a reviewing court we will not disturb the verdict, although we might have found differently had we heard the case originally.

The individual defendants asked the court to submit to the jury a form of verdict finding for them alone, which request was denied. In this there was no error, since it did not find either for or against the corporation defendant. Plaintiff was, in any view of the case, entitled to a verdict against the Rapid Transit & Power Company and the draft of verdict prepared and submitted by the sureties was imperfect, in that it did not so provide.

Complaint is made of the form of verdict returned, which is as follows:

"We, the jury in this case, being duly impaneled and sworn, do find for the plaintiff and assess its damages at \$1,601.25.

F. AULT,

"Foreman."

The verdict is not objectionable as being indefinite in not specifying who the finding is against. The damages are assessed in favor of the plaintiff and against all of the defendants. Nothing could be plainer. Had the verdict

Metz v. State.

been in favor of some of the defendants and against others, then it would have been necessary to specify which ones the finding was in favor of and which against. The verdict is the usual form of a general one in favor of the plaintiff. Again, objection was first made to the form of the verdict in the motion for a new trial. This was too late to be of any avail. Objection should have been made at the time of the rendition of the verdict. (*Parrish v. McNeal*, 36 Neb., 727; *Roggenkamp v. Hargreaves*, 39 Neb., 540.) Judgment is

AFFIRMED.

GEORGE METZ V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1895. No. 7708.

1. **Criminal Law: SEPARATE TRIALS: INDICTMENTS.** Defendants jointly indicted for a felony, in the discretion of the court, may be separately tried, on motion of either the state or a defendant.
2. ———: ———: **OBJECTION.** Objection to a severance comes too late after the formation of the jury.
3. **Burglary: STOREHOUSE.** A building, erected upon a farm, designed and used for the purpose of storing corn after it is husked, is a storehouse and warehouse within the meaning of section 48 of the Criminal Code defining burglary.
4. ———: **EVIDENCE.** Evidence examined, and *held* sufficient to establish that the burglary was committed in the night season.
5. ———: ———. A breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to entering is forcibly removed.
6. **Criminal Law: WITNESSES: INSTRUCTIONS.** Error cannot be successfully assigned upon the omission of the trial court to instruct the jury in a criminal prosecution that the failure of the defendant to testify creates no presumption against him, where no instruction presenting such special feature of the trial was requested.

Metz v. State.

7. **Instructions: ASSUMPTIONS OF FACT.** It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony.
8. ———: **ERROR.** The giving of an erroneous instruction is reversible error, although a correct exposition of the law on the same point has been given to the jury.
9. **Burglary: POSSESSION OF STOLEN GOODS: EVIDENCE.** That a building was burglariously entered, and property stolen therefrom was, soon thereafter, found in the exclusive possession of the accused, do not, alone, raise a presumption of law that he is guilty of the burglary. The inference to be drawn from such facts is for the jury alone to determine, when considered in connection with all the other facts proven.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J.

Alex. Altschuler, J. C. McNerney, and Frank D. Eager,
for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day,
Deputy Attorney General, for the state.

NORVAL, C. J.

An information was filed in the district court of Lancaster county charging George Metz and Frank Milehem with the crime of burglary, by feloniously breaking and entering, in the night time, the storehouse and warehouse of one Jasper N. Binford. Metz, without objection on his part until after the jury were selected and sworn, was given a separate trial which resulted in a verdict of guilty. A motion for a new trial was overruled, and he was sentenced to an imprisonment of two years' duration, and to pay the costs of prosecution; from which he prosecutes a petition in error.

Objection is made that the plaintiff in error was tried separately and not jointly with Frank Milehem, with whom he was jointly charged in the information. Section 465

of the Criminal Code declares: "When two or more persons are indicted for felony, each person so indicted shall, on application to the court for that purpose, be separately tried," etc. Under this statute severance and separate trials of persons jointly indicted or informed against are permissible in felonies, at the discretion of the court. The application to award separate trials may come from the prosecuting officer as well as the defendants. (*State v. Marvin*, 12 Ia., 499, *Allen v. State*, 10 O. St., 287; *Stewart v. State*, 58 Ga., 577.) The record in this case fails to disclose upon whose motion the severance was granted; nor does it appear that any objection or exception was made by the plaintiff in error to a separate trial until after the selection of the jury. This was too late to make the exception of any avail. (*State v. McLane*, 15 Nev., 345; *McJunkins v. State*, 10 Ind., 140.)

The plaintiff in error questions the sufficiency of the evidence to sustain the verdict. The record shows that the prosecuting witness owned a building eight feet by twelve feet and twelve feet high, which was filled with ear corn. There was left an opening near the top through which the corn was thrown into the building, or crib as it is called by some of the witnesses. During the night of August 8, 1894, without the knowledge or consent of Mr. Binford, a board near the bottom of this crib or building was removed, which let a quantity of the corn fall upon the ground. About twelve bushels of this corn was put into a wagon and hauled to Mr. Metz. Early in the morning of August 9, the wagon and team were tracked by several persons to the prisoner's house, the corn in question was found in his possession, and the team and wagon were identified as belonging to the prisoner. In addition to the facts and circumstances detailed above, the state produced as a witness one Henry Grossman, who testified, substantially, that Metz came to the witness and tried to induce him to falsely testify in this case, and that he, Metz, purchased the corn in

Metz v. State.

dispute from him. A written memorandum of such alleged sale, written by Metz in the account book kept by the witness, was introduced in evidence at the trial. The defendant called witnesses to establish an *alibi*,—that the prisoner was at home at the time the burglary was committed; also, that he purchased the corn from one Connely, and paid him for it. Notwithstanding this testimony, we are constrained to hold that the facts and circumstances detailed by the witnesses for the state were sufficient to justify the jury in reaching the conclusion that Metz participated in the burglary and the stealing of the corn.

The point is made in the brief of counsel for plaintiff in error, that the building, which the evidence disclosed was burglarized, is not the one that is described in the information, nor yet one of those mentioned in the section of the statute defining burglary. Whether this contention is well founded is the question which is now to be considered. Section 48 of our Criminal Code declares: "If any person shall, in the night season, willfully, maliciously, and forcibly break and enter into any dwelling house, kitchen, smoke house, shop, office, storehouse, mill, pottery, factory, watercraft, school-house, church or meeting house, barn or stable, warehouse, malt house, still house, railroad car factory, stationhouse, or railroad car, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year." The information in the case charges the breaking and entering by the prisoner of a warehouse and storehouse. It will be observed that the provision of the Criminal Code copied above does not contain the word "corn-crib," but, among the buildings subject to burglary, the section enumerates a warehouse and a storehouse. If the building which was broken and entered by the accused is neither a warehouse nor storehouse, within the meaning of the statute

under consideration, then it is plain the crime charged has not been committed, and the judgment of conviction cannot stand. The question lies within a narrow compass, and is simply whether the words "warehouse" and "storehouse," as employed in the statute, can either, and if so, which, of them be so construed as to include a building in which corn is stored. "Warehouse" is defined by the Century Dictionary thus: "A house in which wares or goods are kept; a storehouse." And the same authority defines storehouse: "A house in which things are stored; a building for the storing of grain, food-stuffs, or goods of any kind; a magazine; a repository; a warehouse; a store." Bishop, Statutory Crimes, section 293, defines the word "warehouse" as follows: "In popular language, and by the better opinion in legal, this word signifies an apartment or building for the temporary deposit of goods. Therefore, a cellar wherein they are kept, to be removed when wanted for sale, or a railroad depot for the reception of goods and passengers, is a warehouse." 1 Wharton, Criminal Law, section 794c, says the word "storehouse" is a wider term than warehouse, and includes a storage for family as well as for business purposes. The definition of "corn-crib," as given by Webster's Dictionary, is "a crib for storing corn." The evidence on the trial showed that the building broken and entered was what is commonly called a "corn-crib." It was erected on the farm of the prosecuting witness and designed and used by him for the exclusive purpose of storing corn raised upon the farm, after it was husked. In the light of the foregoing definitions we are fully satisfied that the building in question was a "storehouse and warehouse" within the intent and meaning of the statute defining burglary, and was correctly so described in the information. In *Wilson v. State*, 24 Conn., 57, it was ruled that a banking house is a store, shop, or warehouse within the meaning of the statute making it burglary to break and enter a shop, store, or warehouse

Metz v. State.

of another with the intent to steal. (See *Hagan v. State*, 52 Ala., 373.) In *Ray v. Commonwealth*, 12 Bush [Ky.], 397, it was decided that a granary built and used for keeping and preserving farming implements, etc., was not improperly described in the indictment as a warehouse. Under the statute, the breaking and entering the building must have been done in the night season in order to constitute burglary. It is insisted that there is a total failure of proof to show that the offense laid in the information was committed in the night time. The undisputed evidence is to the effect that the prosecuting witness, Binford, was working near the crib on August 8 until night and it was then undisturbed; that the next morning about daylight, Mr. McGee, one of his neighbors, came over and waked Mr. Binford, who arose, went out to the crib and discovered that it had been broken open and some of the corn taken therefrom. It was further proven by the defendant's own witnesses that Mr. Metz' horses and wagon, together with the corn which was found in his possession the morning after the crime was committed, were brought to his home about 12 o'clock of the night of August 8. The foregoing evidence was sufficient to establish that the burglary was committed during the night season.

The accused did not take the witness stand in his own behalf. It is argued that the court erred in not instructing the jury that the defendant's neglect so to do created no presumption against him. By section 473 of the Criminal Code it is provided: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." The defendant having availed himself of the protection of the statute, he might have requested the court

to instruct the jury that no presumption of guilt arose from his failure to testify; but he did not request the court to so charge, and error cannot be successfully assigned upon the omission of the court to give such an instruction on its own motion. This conclusion in no manner conflicts with the holdings of this court that in criminal prosecutions it is the duty of the court, whether requested or not, to present the issues to the jury by proper instructions. Manifestly a charge is erroneous which has the effect to withdraw from the consideration of the jury an essential issue in the case. But a trial court is not bound to instruct upon a special feature of a trial, like the failure of the prisoner to testify, unless so requested.

The fourth and fifth assignments of error, that the verdict is contrary to the third and fourth paragraphs of the instructions, require no special attention. They are disposed of by what has already been said in this opinion.

Two instructions requested by the defendant were refused, which are the basis of the sixth and seventh assignments. We are precluded from reviewing the defendant's requests to charge, since no exceptions were taken to them at the time of their refusal. (*Baldwin v. State*, 12 Neb., 61; *Heldt v. State*, 20 Neb., 492.)

We discover no error in the fifth instruction given by the court on its own motion. By it the court told the jury that a breaking essential to constitute the crime of burglary may be by any act of physical force, however slight, whereby any obstruction to entering is forcibly removed. This is in line with the rule stated by leading text-writers on criminal law, as well as the decisions of the courts of this country. It was also applicable to the facts in the case at bar.

Exception was taken in the court below to the sixth paragraph of the charge to the jury, and the giving thereof is assigned for error. The instruction is as follows:

"6. If you believe from the evidence, beyond a reason-

able doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt, and you should consider this circumstance, if so proven, to your satisfaction, along with the other evidence in the case in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt."

The foregoing was erroneous for more than one reason. By it the court assumed that a burglary and larceny had been committed. The accused, during the entire trial, strenuously insisted that such were not the facts, and it was prejudicial error for the court to assume as established the *corpus delicti*. True, that question was submitted to the jury for their determination by another instruction, but that did not cure the error indicated in the instruction quoted, since the jury would be left in doubt as to which instruction should guide them in their deliberations. (*Ballard v. State*, 19 Neb., 609.) The instruction under consideration is bad, for the reason it misdirected the jury as to the presumption arising from the possession of stolen property. In a prosecution for larceny, some of the courts say that the exclusive possession by the defendant of the property stolen recently after the theft, unexplained, is *prima facie* evidence of guilt. Other courts, including ours, lay down the doctrine that in larceny cases no such presumption exists, but that the effect to be given to the fact of possession of stolen property is solely for the jury to determine, when considered in connection with all the other facts and circumstances disclosed on the trial. (*Robb v. State*, 35 Neb., 285; *Dobson v. State*, 46 Neb., 250.) In *Robb v. State*, *supra*, the writer used this unfortunate expression, which is now withdrawn: "It is only where the

possession of goods recently stolen is unexplained that the presumption *prima facie* of guilt arises." From the general scope of the opinion in that case it is obvious that the court intended to, and did, decide that no presumption of guilt arises from the mere fact of possession of stolen property, but that the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evidence adduced on the trial. The presumption of guilt never arises from the mere possession of stolen property, unless the defendant has come into such possession recently after the theft, and such possession is unexplained, even in states where the rule of presumption prevails. Both of these elements are omitted from this instruction. The bare possession of stolen property is not, alone, presumptive evidence of the burglary. In burglary it is necessary that the breaking and entering be committed in the night-time, and the presumption will not be indulged that the breaking and entering were in the night season from the fact alone the defendant was found in possession of the fruits of the crime; but in prosecutions for burglary, like those for larceny, the effect to be given to the fact of possession is solely for the jury. (1 Wharton, Criminal Law, sec. 813; *People v. Gordon*, 40 Mich., 716; *People v. Beaver*, 49 Cal., 57; *People v. Hannon*, 85 Cal., 374; *Methard v. State*, 9 O. St., 363.) It is true, as suggested by the attorney general, that the sixth instruction in this case is almost identically the instruction given in *Whitman v. State*, 42 Neb., 841, which was approved by this court. In that case the point was not made that the trial court assumed that a burglary and larceny had been committed, nor was that feature of the charge reviewed. Again, the instruction in that case, as was said by RYAN, C., "confined the presumption which might be entertained to larceny of the goods themselves;" while in the case at bar the jury were told that the presumption might be indulged from the fact of possession of the stolen property that the defendant was

Dehning v. Detroit Bridge & Iron Works.

guilty of the burglary. It is obvious that the instruction that we have been considering is the more objectionable of the two. Nevertheless, the instruction in the Whitman case is contrary to the rule announced in *Robb v. State*, and *Dobson v. State, supra*, and in so far as the decision in *Whitman v. State* conflicts with the two cases mentioned it is overruled. It was error to give the sixth instruction, for which the case must be reversed. The trial judge was, doubtless, led to make this mistake by our prior decision.

The conclusion reached makes it unnecessary to examine the other assignments of error. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHRIS DEHNING, ADMINISTRATOR, v. DETROIT BRIDGE
& IRON WORKS.

FILED DECEMBER 7, 1895. No. 5904.

1. **Master and Servant: RISKS OF EMPLOYMENT.** A person who contracts to perform labor or services for another is presumed to have so contracted in view of the risks ordinarily incident to or connected with the employment. He assumes all such risks.
2. ———: ———. An employe assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.
3. ———: ———: **NEGLIGENCE.** The above rule has been modified in this state as follows: "Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable

Dehning v. Detroit Bridge & Iron Works.

skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence." (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318.)

4. **Trial: DIRECTING VERDICT.** When the evidence is insufficient to sustain a verdict for plaintiff, it is proper practice for the trial court to direct a verdict for defendant.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

The opinion contains a statement of the case.

Bradley & De Lamatre, for plaintiff in error :

The employer, by law, owes a duty toward the employe independent of any action on the part of the employe, and that is, to furnish suitable and safe machinery and appliances for the performance of the labor required of the employe, and the more dangerous or hazardous the employment the greater the care and duty. (*Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill., 294; *Camp Point Mfg. Co. v. Ballou*, 71 Ill., 417; *Richardson v. Cooper*, 88 Ill., 270.)

Where the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable for damages, unless he can clearly show that he has used due care in the selection or manufacture of the same. (*Weems v. Mathieson*, 4 McQ. [Scot.], 215; *Feltham v. England*, L. R., 2 Q. B. [Eng.], 33; *Warner v. Erie R. Co.*, 39 N. Y., 468; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill., 202; *Northcoate v. Bachelder*, 111 Mass., 322; *Noyes v. Smith*, 28 Vt., 59; *Robinson v. Blake Mfg. Co.*, 143 Mass., 528; *Garneau v. Palmer*, 28 Neb., 310.)

The following cases were also referred to in the argument of counsel for plaintiff in error: *Crutchfield v. Richmond & D. R. Co.*, 78 N. Car., 300; *Rummell v. Dilworth*, 111 Pa. St., 343; *Lent v. Burlington & M. R. R. Co.*, 11 Neb., 204; *Holmes v. Boydston*, 1 Neb., 358; *Johnson v.*

Dehning v. Detroit Bridge & Iron Works.

Missouri P. R. Co., 18 Neb., 696; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583.

Breckenridge & Breckenridge, and *L. F. Crofoot*, contra:

Plaintiff's decedent assumed the ordinary risks of employment. (*Sjogren v. Hall*, 18 N. W. Rep. [Mich.], 812; *Richards v. Rough*, 53 Mich., 212; *Norfolk & W. R. Co. v. Jackson*, 85 Va., 489; *Baker v. Western & A. R. Co.*, 68 Ga., 699; *Hough v. Texas & P. R. Co.*, 100 U. S., 213; *Marsh v. Chickering*, 101 N. Y., 396.)

The fact that an accident has happened raises no presumption of negligence against the person sought to be charged. (*Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 375; *Nitro-Glycerine Case*, 15 Wall. [U. S.], 524; *Curran v. Warren Chemical Co.*, 36 N. Y., 153; *Frech v. Philadelphia, W. & B. R. Co.*, 39 Md., 576; *Bond v. Smith*, 113 N. Y., 378; *Huff v. Austin*, 46 O. St., 386; *Bahr v. Lombard*, 21 Atl. Rep. [N. J.], 190; *East Tennessee R. Co. v. Maloy*, 77 Ga., 237; *Michael v. Stanley*, 23 Atl. Rep. [Md.], 1094.)

Under the undisputed facts defendant is not liable. (*Titus v. Bradford, B. & K. R. Co.*, 20 Atl. Rep. [Pa.], 517; *Knight v. Cooper*, 14 S. E. Rep. [W. Va.], 999; *Anthony v. Leeret*, 105 N. Y., 591; *Moulton v. Gage*, 138 Mass., 390; *Sweet v. Ohio Coal Co.*, 47 N. W. Rep. [Wis.], 182; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Naylor v. Chicago & N. W. R. Co.*, 53 Wis., 661.)

The court properly directed a verdict for defendant. (*Hiatt v. Brooks*, 17 Neb., 38; *Osborne v. Kline*, 18 Neb., 344; *Lea v. McLennan*, 7 Neb., 143; *Grant v. Cropsey*, 8 Neb., 205; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186; *Hammond v. Jewett*, 22 Neb., 363; *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99; *Burns v. City of Fairmont*, 28 Neb., 866; *Berger v. St. Paul, M. & M. R. Co.*, 39 Minn., 78.)

HARRISON, J.

This action was instituted by the plaintiff as administrator of the estate of Adam C. Dehning, deceased, to recover damages alleged to have been sustained through the death of the son of plaintiff, who lost his life while in the employ of the defendant, and, it is further claimed, through the negligence of defendant. It was stated, in substance, in the petition that the defendant was, on or about September 15, 1890, engaged in the construction of a viaduct extending several blocks on and above Tenth street, in the city of Omaha; that Adam C. Dehning was, on or about the date mentioned, employed by defendant to heat rivets used in fastening together certain parts of the viaduct; that such heating was done in a small forge, which was placed upon planks laid on the framework of the upper portion of the viaduct, at a distance of about thirty feet from the ground or the surface of the street beneath; that coal was used as fuel for the forge and was kept on the ground beneath the structure; that a part of the labor to be performed by Adam C. Dehning was to procure this coal from where it was placed on the street, for use in the forge, whenever needed. The allegations in respect to the negligence of defendant were of the placing of the forge upon the viaduct in such a manner that it subjected the employe to risks of bodily injury, or endangered life, and failure to provide safe and proper appliances for use in operating the forge, or suitable safeguards, or safe and secure approaches, walks, or planks for use in passing over the framework of the viaduct in going to or from the platform upon which the forge worked by the young man Dehning was situated. It was further pleaded that by reason of the negligence of defendant, and without any fault or negligence on the part of Adam C. Dehning, on the 15th day of October, 1890, he fell from the viaduct to the ground below and was killed. There was an answer in which,

so far as we need to notice it, there was a denial of any negligence attributable to defendant, and a statement that: "Whatever dangers or risks of injury there were in and about the premises upon which the said Adam C. Dehning, deceased, was employed, the same were open, apparent, plainly visible, and necessarily forced upon the attention of the said deceased. This defendant alleges the fact to be that the said injuries resulting in the death of deceased were received by him by reason of his exposure to the risks incidental to the business, and also by reason of and owing to his own carelessness and negligence in not paying proper care and attention to his surroundings at the time he received the injuries which occasioned his death." When the case was placed upon trial before the court and a jury, the counsel for defendant interposed an objection to the reception of any testimony on behalf of plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was sustained and the plaintiff was allowed to amend his petition, which he did, stating, in addition to what was pleaded in the original petition: "And plaintiff further alleges that at the time when the deceased entered into the employment of defendant as above alleged he was required to work at a far less dangerous height and in a much less dangerous situation, but that after being so in the employ of defendant for some weeks prior to the receipt of the injury complained of, the place or position in which the deceased was required to perform his labor became much higher from the ground and far more dangerous, and by reason of the premises it became and was the duty of the defendant to provide other, different, safe, and suitable safeguards, platforms, passageways, and appliances to enable the deceased to prosecute his required work with safety, and that although the full extent of the dangers to which deceased would be subjected by such negligence of duty on the part of the defendant was not fully known to deceased,

yet that deceased did apprehend some increased dangers by reason thereof and requested of the person in charge of the works for defendant that some other, different, and safer platforms, passageways, or appliances should be furnished him in the prosecution of his required labors, and he was assured that such additional safeguards, passageways, ropes, and other appliances would be furnished as the work should progress; and relying therein the deceased continued in such said employ until and up to the receipt of the fatal injury by him in such said employ as hereinbefore stated, yet the defendant wholly disregarded its duty in that behalf." The answer to the first petition was allowed to remain on file as an answer to the amended petition, and was so treated. There was a trial of the issues, and at the close of the introduction of the testimony counsel for defendant moved the court, for certain stated reasons, to instruct the jury to return a verdict for defendant. This motion was sustained and the jury were instructed accordingly, and returned a verdict for defendant, in conformity to which, after motion for new trial heard and overruled, judgment was entered.

The counsel for plaintiff state in their brief that they present but two points for the consideration of this court: "First—Can the plaintiff recover without first having proven that deceased called the attention of defendant to the lack of necessary safeguards, and got a promise from defendant to supply them, but received the fatal injury before they were supplied? Second—Did the trial court commit an error in taking the case from the jury because these facts were not fully proven?" The correct solution of and answer to the first depends to a large extent upon what were the duties and rights which reciprocally devolved upon and accrued to the respective parties to the contract of employment, by reason of such contract, by entering into it, or at all times during its continuance, and especially in reference to any dangers necessarily or probably incident

Dehning v. Detroit Bridge & Iron Works.

or attached thereto. There is no question which can successfully be raised in regard to the correctness of the rule of law which sets forth the duty of the employer to provide suitable and safe appliances proper for the use of the employe in the performance of the labor to which he is assigned and to properly guard the employe from dangers; but it is also true that when a party becomes the employe of another to perform certain labor, he assumes all risks ordinarily incident to the business. It will be presumed that he made the contract with reference to the risks ordinarily appertaining to the particular employment, and that he had notice of all risks which were open and obvious, or ought to have been, to a person of his experience and understanding, and if he continues in the employment, after full knowledge of defects in or lack of appliances, or risks to which he is exposed, which may be dangerous, and makes no complaint, but voluntarily accepts the risks, if subsequently injured by reason thereof, there can be no recovery. (Cooley, Torts, sec. 552, and cases cited; Wood, Master & Servant, secs. 326, 335; 2 Thompson, Negligence, note 15, p. 1008; McKinney, Fellow-Servants, sec. 30; *Moulton v. Gage*, 138 Mass., 390; *Sweet v. Ohio Coal Co.*, 47 N. W. Rep. [Wis.], 182; *Gibson v. Erie R. Co.*, 63 N. Y., 449, s. c. 20 Am. Rep., 552; *Yates v. McCullough Iron Co.*, 16 Atl. Rep. [Md.], 280; *Casey v. Chicago, St. P., M. & O. R. Co.*, 62 N. W. Rep. [Wis.], 624, and cases cited therein; Bailey, Master's Liability for Injuries to Servant, 169, 170, 171; *Missouri P. R. Co. v. Baxter*, 42 Neb., 793.)

In the case at bar it appears that Adam C. Dehning, the loss of whose life is the basis of the action, applied to the superintendent or foreman of the work in progress on the viaduct for employment, and during the course of the conversation at that time stated in regard to his fitness for and knowledge of the work to be performed, "that he was a rivet heater and used to work up high, * * * was used to the work. He didn't say how long he had worked

at it, but he could do it." He secured employment and was set to work heating rivets in a small or portable forge, which rested on a plank platform twelve feet long and four feet wide placed upon the top of and supported by the framework of the structure being built; that on September 15, 1890, when he commenced work, the position of the forge on the viaduct was such that it was at an elevation of some ten or twelve feet from the ground or street. He continued at the same work during the succeeding days up to and including a portion of October 13, 1890. As the work upon the viaduct progressed, the forge used by young Dehning and its platform were moved along to different positions on the top of the structure so that it was at all times convenient to the men who were connecting the parts of the viaduct and to whom, after heating the rivets, it was the duty of the rivet heater to carry and deliver them. On October 13, 1890, the forge used by the young man Dehning was at a place on the bridge which made its height from the ground some twenty-seven feet, and he, needing coal, went below to procure it, and while returning and walking to the forge, a distance of about thirty feet, on a stringer or part of the framework, from a point at which he reached the top of the structure by a ladder from the ground, and when he had almost reached the platform and was apparently in the act of placing the nail keg, which contained the coal, on the platform, he fell to the ground and was killed. There was also evidence which tended to disclose that there were some others engaged in the same duties as the young man Dehning at another or other forges than the one used by him, and that when they desired coal they went to the ground, and after filling a vessel similar to the one used by him, tied or looped a rope around it and drew it up to the platform on the bridge; that rope was furnished for any necessary purpose; that there was lumber from which walks on and over the open framework of the bridge could have been laid if they were desired, and also

that the ladder by which the ascent from the ground to the top of the framework of the structure was made could have been moved from the position it occupied on October 13, 1890, to one where any person going up it, on reaching the top would have been very near, or almost upon the platform of the forge used by Dehning. But however the facts may have been in respect to all these matters, it is clear that the risks of the employment, including the carrying of coal, the appliances to be used, the manner in which it was done and to be done, were apparent and obvious, and that during the time that Dehning had worked (almost a full month) he must have acquired full knowledge, must have been aware of them, and there was an entire failure to show that he made any complaint or asked for any changes to be made, and it must be inferred that he voluntarily accepted and assumed them. A full and careful review of all the testimony satisfies us that it was wholly insufficient to authorize or sustain a verdict for plaintiff, and this being true, the action of the court in directing a verdict for defendant was proper and correct.

We deem it best here to notice some decisions of this court in which a modification of the rule herein declared and applied to the existing facts, was announced and adopted. One of the cases alluded to is that of *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578. It was there said: "The facts in this case may be briefly stated to be that the defendant in error had, for about two years, been in the employ of the plaintiff in error as a locomotive engineer on its railroad; that he had had charge of this particular engine for a considerable part of this time. Toward the latter part of this employment he noticed what he conceived to be evidences of weakness in that part of the locomotive known as the throat sheet. He called the attention of the proper officers and agents of the plaintiff in error to this fact, and upon examination it was thought there was no immediate danger, and he was instructed to continue with the

engine until such time in the near future as they could effect an exchange and cause the necessary repairs to be made. Afterward, seeing, as he thought, increasing signs of weakness in that part of the boiler, he again, and on several occasions, called attention to the facts, when he was informed that another engine would be furnished him in a given time and requested to continue with the one in question until that time, which he did, and for two days longer, when the accident occurred. During this time he was careful to keep the steam at a comparatively low pressure, and supposed that with this precaution there was no immediate danger. It is not claimed, and cannot be, that the explosion was caused or brought about by any negligent act of his. Under these circumstances it seems to us that the true rule might be stated to be, that if the defective machinery, though dangerous, is not of such a character that it may not be reasonably used by the exercise of care, skill, and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident. At least such a rule is as favorable to the plaintiff in error as could, in our opinion, be reasonably required by it, and especially would this be true when it is shown that the master was fully informed of the apparent danger and the machinery used upon his request and judgment. (*Snow v. Housatonic R. Co.*, 8 Allen [Mass.], 441; *Colorado C. R. Co. v. Ogden*, 3 Colo., 499; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St., 389; 2 Thompson, Negligence, 967; *Keegan v. Western Railroad Corporation*, 8 N. Y., 175.)" We desire particularly to challenge attention to the facts that the employe had informed the proper officers and agents of the employer of the defects in the machinery, and been instructed to continue its use until a time

Dehning v. Detroit Bridge & Iron Works.

in the near future, coupled with the promise of an exchange and to have the necessary repairs made.

Another case in which the modification of the general rule was recognized is *Lee v. Smart*, 45 Neb., 318. The party suitor in that case, it appears, was employed by a lumber merchant, in the city of Omaha, in the capacity of a teamster, his work being the hauling of lumber. The writer of the opinion, Post, J., after stating the modification of the rule as announced in *Sioux City & P. R. Co. v. Finlayson*, says: "That the case at bar is within the exception there recognized, is apparent from a brief reference to the evidence in the record. The plaintiff, according to his own testimony, discovered the day after he entered the defendant's service, that there were no blocks in the brake-bars of the wagon assigned to him, and asked the defendant if it was necessary to fix them, to which the latter replied that other men had used the wagon without being fixed, and that he [the plaintiff] could, because the streets were level. The plaintiff appears to have had little knowledge regarding the weight of the load in question, but according to the testimony of Mr. Fry, who assisted in putting the lumber onto the wagon, it consisted of 2,945 feet of green poplar, weighing upwards of 8,500 pounds, or more than twice the weight of a reasonable load under the circumstances. Said witness testified further, that when the wagon was about three-fourths loaded, he called the defendant's attention to the fact that there was danger of overloading it, to which the latter replied that he wanted to put on a heavy load, as he was obliged to pay toll on crossing the bridge. The plaintiff, who, it is shown, had never crossed the river by means of the bridge mentioned, experienced no difficulty until he had started down the grade at the east end of the bridge, when, as claimed, without fault on his part, he lost control over the team in the manner and with the result above stated. The trial court, on this evidence, correctly declined to advise the jury that the plaintiff, as a

matter of law, assumed the risk of accident, although he knew, or might with reasonable diligence have known, that there was danger in thus using the wagon without a brake, heavily loaded as it was; and by proper instructions the question was submitted whether in attempting to cross said bridge the plaintiff exercised reasonable caution, or whether, in so doing, he was guilty of contributory negligence."

In the case of the *Sioux City & P. R. Co. v. Finlayson* the evidence clearly developed that there had been a complaint or objection to the proper person or persons of the unsafe and defective condition of the machinery, and a continuance of its use by requirement of the employer under promise that the subject of complaint should be removed or remedied; and in the case of *Lee v. Smart* it was shown that objection was made to the imperfect or defective condition of the brake to the wagon, and its further use was by direct requirement of the employer, and in both cases it further appeared that the machinery and appliances, although unsafe, were such as might be safely used by the exercise of reasonable skill and care on the part of the employe. The facts in these cases placed them clearly and unmistakably within a well-defined and recognized exception to the general rule, and they are not, in the doctrine announced in the decisions of them, in conflict with the rule applied in the present case, but plainly distinguishable from the case at bar, in which there were no facts shown which called for any modification of the general doctrine or made it within the exception thereto.

The opinion in the case of *Kearney Electric Co. v. Laughlin*, 45 Neb., 390, which was filed on the same day as the opinion in *Lee v. Smart*, *supra*, and was cited therein, and which cited, in support of the views therein expressed, the case of *Sioux City & P. R. Co. v. Finlayson*, *supra*, and also *Lee v. Smart*, turned mainly upon the proposition that the risks or hazards of the employment in which the plaintiff was engaged when injured were not obvious, open,

Commercial State Bank of Crawford v. Ketcham.

and apparent, and were of such a character that he did not have knowledge of them and could not be charged with knowledge, and the facts of the case were such as to entirely withdraw it from the operation of the general rule. There is no conflict between the rules stated in the opinion in that case and in the present case. The judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the decision.

COMMERCIAL STATE BANK OF CRAWFORD V. WILLIAM
H. KETCHAM.

FILED DECEMBER 7, 1895. No. 5838.

1. **Replevin: AFFIDAVIT: JUSTICE OF THE PEACE.** The affidavit required by the provisions of the Code of Civil Procedure, in an action commenced before a justice of the peace to recover the possession of specific personal property, is the basis of the action and is jurisdictional and must be filed before a valid writ can issue.
2. ———: ———. Where the original affidavit in an action of replevin contains a defective statement of the necessary averments of the plaintiff's rights or claims, it may be amended to make clear or certain that which was indefinite or uncertain.
3. ———: ———: **AMENDMENT: CORPORATIONS.** When in an action of replevin, instituted by a corporation or partnership, the affidavit is made by some person for the corporation or partnership, it must, in its averments, refer to the rights and claims of the corporation or firm and not those of the affiant, and if, in each necessary allegation, it refers to the claims of the affiant, the affidavit will be treated as in favor of the affiant individually, and insufficient to authorize the issuance of an order of delivery in favor of the corporation or firm, and where such writ was issued and is attacked by motion to quash on the ground of insufficiency of the affidavit, such affidavit may not be amended so as to make it one in favor of the corporation or partnership.

ERROR from the district court of Dawes county. Tried below before BARTOW, J.

E. W. Dailey and *A. W. Crites*, for plaintiff in error.

Allen G. Fisher, *contra*.

HARRISON, J.

In an action of replevin commenced before a justice of the peace of Dawes county by the Commercial State Bank of Crawford against William H. Ketcham the affidavit filed to procure the issuance of the writ of replevin was as follows: "R. G. Smith, cashier Commercial State Bank of Crawford (a Nebraska corporation), being duly sworn, deposes and says that he has a special ownership and is entitled to the immediate possession of the following described goods and chattels, to-wit: One entire newspaper outfit and job office used formerly by publishing the Crawford *Clipper*, and job office and Marsland *Tribune*, now used in the newspaper and job office of the Crawford *Tribune*, comprising presses, type racks, subscription lists, fixtures, and everything used in operating the newspaper and job office of the Crawford *Tribune* in Crawford, Nebraska, and that the said property is wrongfully detained by one William H. Ketcham; that the said property was not taken in execution or any order or judgment against him, nor for the payment of any tax, fine, or amercement assessed against him, nor by virtue of an order of delivery issued in replevin, nor any other *mesne* or final process issued against this affiant." The writ was issued, served, and returned, the appraisement of the property showing a value exceeding \$200, the proceedings were certified and the case transferred to the district court as is provided by section 1039 of the Code of Civil Procedure. In the district court a motion was made by the defendant to quash the writ for the reason that there never had been any affidavit filed as a basis for

the issuance of the writ, or, to more clearly state the ground of the motion, that the affidavit filed with the justice of the peace to obtain the writ of replevin alleged the special ownership of the property sought to be recovered to be in R. G. Smith, and also set forth its detention from him, and that no affidavit was filed stating ownership, general or special, in the plaintiff and the detention of the property as against its rights of property and possession. Pending the hearing of this motion the attorneys for plaintiff tendered and asked leave to file what was styled an "amended affidavit in replevin," in which was stated that plaintiff had a special ownership in the property in controversy and its wrongful detention by the defendant in opposition to plaintiff's right of possession. The request of plaintiff for leave to amend was denied and the motion of defendant sustained and the writ quashed, and, on demand of defendant, a jury was impaneled and inquiry made in regard to his right of property and possession and his damages. The result was a verdict and judgment in favor of defendant. The plaintiff presents the case here for review, the principal error alleged, and of which complaint is made, being the refusal of the trial court to permit the filing of what was offered as an amended affidavit.

It is contended by counsel for plaintiff that an affidavit filed in an action of replevin is a pleading, within the meaning of section 144 of our Code of Civil Procedure, which provides that any pleading, process, or procedure may be amended in furtherance of justice before or after judgment, on such terms as may be just, by correcting a mistake in any respect, or by inserting other allegations material to the case, and any proceeding, may, by amendment, be made conformable to the provisions of the Code; that an affidavit in replevin may be amended, and that the affidavit presented in the case at bar as an amendment should have been allowed. Filing an affidavit in replevin has been held in this court to be a proceeding, and that the af-

fidavit, if defective, may be amended. (*Wilson v. Macklin*, 7 Neb., 50.) But it has also been stated that when the object of the action is to obtain the possession of property alleged to be wrongfully detained by defendant, the filing of the affidavit prescribed by the statute is a prerequisite to the issuance of the writ, is jurisdictional, or, if none is filed, the writ is a nullity. (*Bardwell v. Stubbert*, 17 Neb., 485, and cases cited.) In replevin before a justice of the peace the affidavit is the basis of the suit, is that upon which the jurisdiction is predicated, and, unless it is filed, there is no jurisdiction. (Cobbey, Replevin, secs. 525, 526, 528, 529.) Where a corporation or partnership is plaintiff, although the affidavit is made by some person for the corporation or firm, it must state the possession or right of possession sought to be asserted is that of the corporation or the firm, and where the party making the affidavit is alleged to be connected with the corporation or firm, or a member thereof, and the affidavit further states the interest in the property to be that of the affiant and a violation of his rights individually, the proceeding is one in his behalf as an individual, and not in favor of the corporation or firm. (Cobbey, Replevin, sec. 562; *McEvoy v. Hussey*, 64 Ga., 314; *McClain v. Cherokee Iron Co.*, 58 Ga., 233.) The affidavit in the case at bar did not allege interest in the property existing in the bank; did not assert that it had any right in the property in controversy, either special or general, or that any right belonging to it had been violated; but, on the contrary, in each particular in respect to which an allegation, either positive or negative, was necessary in the statements of the affidavit it referred to the affiant and not the bank. This being true, in our view the affidavit was in behalf of the affiant and not the bank, and not the subject of amendment in favor of the bank, or, as proposed in the affidavit tendered, in which the interest and rights of the bank were stated. It was not an indefinite or defective statement, necessary to entitle the bank to the

issuance of the writ of replevin, but there was an entire absence or lack of such statement, and further, a positive setting forth of the rights of another party (the affiant) to demand the writ to issue.

To support their contention that the affidavit in this case was properly amendable, and that the trial court erred in deciding that it was not, counsel for plaintiff especially direct attention to a decision of the supreme court of Kansas (*Meyer v. Lane*, 40 Kan., 491) and one of this court (*Lewis v. Connolly*, 29 Neb., 222). In the case cited decided by the Kansas court it appears that an action was "commenced by Daniel Lane against Meyer Bros., S. C. Lang & Co., et al., to obtain possession of a stock of drugs and fixtures valued at \$1,000. An affidavit was filed by George S. Chase, the attorney of Lane, and an order of delivery obtained, and the property turned over to him. Meyer Bros. et al. filed a motion to set aside the order of delivery upon the ground that the affidavit did not state that the plaintiff was the owner of the property and entitled to its immediate possession. The affidavit was defective, but subsequently, George S. Chase, an attorney of Daniel Lane, filed an amended affidavit relating back to the time of the filing of the original. This affidavit cured all defects in the original affidavit, if such defects could be cured by amendment; but also stated that the plaintiff Daniel Lane was a minor, being under twenty-one years of age. Thereupon Meyer Bros. et al. filed their motion to strike out the amended affidavit on the grounds that the plaintiff had no legal capacity to sue, and that the affidavit was not amendable. The motion was overruled and defendants excepted." The court held: "An original affidavit in replevin may be amended so as to state sufficiently what has already been stated informally and indefinitely." From this we conclude that there was not an entire failure to state the facts necessary to be alleged in the affidavit, but that there was an indefinite or defective statement of them.

Lewis v. Connolly, the case referred to of the opinions of this court, it appears, was an action of replevin commenced in the district court of Cherry county, in which the clerk, upon the filing of the petition in the case and no other or further affidavit or statement by the plaintiff, issued the writ. In order to a thorough understanding of the case of *Lewis v. Connolly*, and the applicability of the rule therein announced in the case at bar, we deem it best to specially call attention to the manner of instituting an action of replevin in the district courts of this state, and also before justices of the peace, and some of the points of difference. In this, as in other cases commenced in the district court, the first proceeding is the filing of a duly verified petition, in which is stated the plaintiff's cause of action, and the plaintiff may at the commencement of the suit, or at any time before answer, claim the immediate possession of the property the possession of which is the subject and object of the suit, by filing with the clerk the affidavit as prescribed by statute. (See secs. 181, 182, Code of Civil Procedure.) In an action before a justice of the peace an action to recover the possession of specific personal property shall not be brought until the prescribed affidavit is filed by plaintiff. (Secs. 1033, 1034, Code of Civil Procedure.) In the first the petition is the foundation of the action, and the affidavit the basis for the issuance of the writ; in the second the affidavit serves the double purpose, being the basis of the action and also for the issuance of the order of delivery. In the case of *Lewis v. Connolly*, *supra*, it was held: "Where a petition in an action of replevin contained nearly all the allegations required in the affidavit prescribed by section 182 of the Code, and was verified upon the belief of the plaintiff and filed in the clerk's office and a writ of replevin issued thereon, the writ is voidable and not void, and the court, upon such terms as may be just, may permit an affidavit in proper form to be made and filed as of the date of the com-

Commercial State Bank of Crawford v. Ketcham.

mencement of the action;" and in the body of the opinion it was stated: "Where it is sworn to positively, no doubt a pleading in a proper case may perform the office of a pleading and also of an affidavit, but it cannot do so where the oath is upon mere belief. The reason for this is so apparent that it need not be stated. The affidavit, however, was not void, but merely voidable. It was on file properly sworn to as a petition and was regarded by the clerk as sufficient. It differs from a case where no oath was on file. In the latter case the court would have no jurisdiction, while in the former, there being an imperfect oath, the court has jurisdiction, and may, upon such terms as may be just, permit an amended affidavit to be filed to relate back to the time of bringing the action. The court, therefore, should have sustained the objections to the affidavit and permitted a new one to be filed." It will readily be seen that in the case to which we have alluded, and also the one cited in the Kansas report to which reference has been made, that there was that on file which was treated by the court in each instance as sufficient, though imperfect, to vest the court with jurisdiction and to be the proper subject of amendment. Not so in the case at bar. Here, in a case commenced in justice court, where the affidavit gives jurisdiction of the action and also to issue the writ, there was not an imperfect oath, or an uncertain or doubtful statement of any claim to the property or its possession in the plaintiff, but a total lack of such statement, and instead thereof positive averments of such rights in a person other than plaintiff. The judgment of the district court is

AFFIRMED.

ZIBE JONES V. JOSEPH DRISCOLL.

FILED DECEMBER 7, 1895. No. 5716.

1. **Appeal from Justice Courts: TRANSCRIPTS.** In error proceedings from a justice of the peace to reverse a judgment because it was alleged by affidavit that less than six jurors found the verdict upon which was based such judgment, the recitations of the transcript must prevail over contradictory statements embodied in the affidavit.
2. **Trial: VERDICT: WAIVER OF OBJECTIONS.** A litigant who does not object to mere irregularities in receiving a verdict, when the existence of such irregularities is known to him at the time they occur, cannot complain of them for the first time upon error proceedings in the district court.
3. **Contracts: DAMAGES: SET-OFF.** A cause of action arising upon contract may properly be pleaded by way of set-off in an action brought for the recovery of damages. Following *Raymond v. Green*, 12 Neb., 215.

ERROR from the district court of Sarpy county. Tried below before SCOTT, J.

James Hassett and H. C. Lefler, for plaintiff in error.

James P. Grove, contra.

RYAN, C.

This action originated before John Thomas, a justice of the peace of Sarpy county, and was afterwards transferred to W. A. Wooley, another justice of the peace. A judgment having been rendered in favor of the plaintiff by the justice of the peace last named, the defendant prosecuted error proceedings to the district court, wherein the judgment which had been rendered by the justice of the peace was reversed. In the petition in error upon which this reversal was had the grounds upon which the reversal was sought were stated in this language:

"First—Five jurors were sworn to try the said cause, and sat upon the trial thereof, but no verdict was rendered by said jury; but three members of the said jury were present in open court at the rendition of such alleged verdict purporting to be the verdict of the original jury sworn to try the cause.

"Second—After the jury were sworn to try the cause, the plaintiff, by his attorney, moved the court to strike the second part or division of the defendant's bill of particulars, the same filed as an offset for rental of twenty acres of land at three dollars per acre, with interest from the 23d day of January, 1891, and due December 1, 1891; and said motion was sustained by said justice and the defendant's set-off was stricken, against defendant's objection."

The transcript of the justice of the peace showed a return of a verdict by the jury. It also showed that one juror, by agreement, had been excused. No question is raised as to this particular juror, but it is insisted that there were present when the verdict was returned but four jurors. The transcript, however, only shows that, when the verdict was returned, the jury was asked if it was their verdict and four jurors responded in the affirmative. By affidavit an attempt was made to show that one juror in fact was not present, but the record discloses no objection made to receiving the verdict when it was returned, neither does it seem that the alleged irregularity existed or was urged at all until it was presented for consideration in the district court. This was too late. (*Wasson v. Palmer*, 13 Neb., 377; *Scott v. Waldick*, 12 Neb., 5.) The above quotation from the averments of the petition in error, passed upon in the district court, sufficiently describes the counterclaim as it appears elsewhere in the record; but the transcript considered in the district court, which is certified to this court, begins with a recitation of the receipt by Mr. Wooley, as a justice of the peace, of a transcript of the docket of Mr. Thomas, another justice of the peace, and of

STORZ v. Finklestein.

the papers in this cause. This is followed by a minute showing when the cause was set for trial, and that notice thereof had been given the parties. Immediately succeeding is a copy of the answer of the defendant, and then, in due order, the further proceedings in the case. Nowhere, however, are we able to find any description of the nature of the plaintiff's cause of action. Evidently the justice of the peace who tried the case certified only as to the docket entries originally made by himself, and omitted to show the nature of the record made by the justice of the peace before whom the action was begun. By this oversight, most likely, the bill of particulars was omitted from the transcript filed in the district court. This, however, is not specially material, for, even if suit was commenced for the recovery of damages, it was proper to set up by way of a set-off any cause of action arising upon a contract which, before the commencement of the action, was held by the defendant. (Code of Civil Procedure, sec. 104; *Raymond v. Green*, 12 Neb., 215.) In any view we take of this case, therefore, the judgment of the district court was correct and accordingly it is

AFFIRMED.

STORZ & ILER v. L. M. FINKLESTEIN.

FILED DECEMBER 7, 1895. No. 5860.

1. **Contracts: PUBLIC POLICY: UNLAWFUL CONSIDERATION.** No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.
2. ———: ———: ———: **SALES.** Plaintiff sued the defendant for the purchase price of beer to which the defendant by way of counter-claim pleaded payment for a license to sell beer, which, as defendant alleged, plaintiff had agreed to furnish to enable defendant to make such sales. By reply, plaintiff alleged a

Storrs v. Finklestein.

custom in accordance with which a retail traffic in beer had been carried on by defendant under and by virtue of a license held by the plaintiff, which traffic in legal effect was a violation of the statute of Nebraska regulating traffic in liquors. *Held*, That for the purchase price of beer sold under these circumstances plaintiff was not entitled to recover against the defendant.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

See opinion for reference to authorities.

Lake, Hamilton & Maxwell, for plaintiff in error.

Estabrook & Davis and *C. E. Clapp*, contra.

RYAN, C.

This action was brought by the plaintiff in error, a partnership firm engaged in the manufacture of beer, to recover of defendant the sum of \$707.06, the price of certain beer alleged to have been furnished by plaintiff to defendant in the month of June, 1889. By way of counter-claim the defendant alleged that the beer was furnished him by plaintiff under a written agreement which required that the plaintiff should furnish the license necessary under the laws of Nebraska; that plaintiff had neglected to provide this license, and that in consequence of such neglect the defendant had been required to pay the sum of \$1,000 for such license. By reply the plaintiff averred that if the defendant had taken out a license it was to enable him to sell vinous and spirituous liquors and not to enable him to perform his contract with the plaintiff. There was also in the reply this language: "The plaintiff further alleges that there is and has been since long before September 1, 1888 [the date of a written contract between plaintiff and defendant], a usage and custom existing and prevailing among brewing companies generally, and particularly in the state of

Nebraska, and in the city of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that under said usage and custom said bottling department had been conducted under the liquor license issued to the brewery and through an agent who receives beer from the brewery at a fixed price, and who operates the bottling department as a part of, and in the interest of, the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiff and the said defendant with knowledge of, and with reference to, said usage and custom, and that said usage and custom thereby became and is a part of said contract." Upon the trial defendant admitted that he owed plaintiff the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiff's action and for a judgment for costs for the reason that "the pleadings upon their face show that the sales for which plaintiff sought to recover were made in pursuance of an unlawful contract between the plaintiff and the defendant, and for the further reason that the contract under which the sales were made, contemplated the resale of said beer by the defendant with the intent and for the purpose, on the part of the said plaintiff, of enabling the defendant to resell contrary to law." This motion was sustained and judgment was accordingly rendered against the plaintiff for costs.

From the fact that the plaintiff brought suit for the price of the beer agreed upon between himself and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiff's beer. The petition was framed upon the theory that plaintiff had sold the defendant the beer for which suit was brought, though the use of the word "sale," or any equivalent term, was avoided. It is equally clear that as a retail vendor of liquor the defendant was by section 25, chapter 50, Compiled Statutes, required

to pay a license of \$1,000, his place of business being, as it was, in the city of Omaha. By the reply there was alleged a custom with reference to which the parties litigant had contracted whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiff, however, insists that since the defendant had admitted that he had obtained the beer from plaintiff and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted as the jury was by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned.

The plaintiff has cited only one adjudged case which is directly in point, and as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length. The case referred to is *Manchester & L. R. Co. v. Concord R. Co.*, 20 Atl. Rep. [N. H.], 383, in which there is quoted with approval the following language found in 2 Morawetz, Private Corporations, section 721: "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality or there are other reasons of public policy why the courts should refuse to grant any relief in the case. * * * These

doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and, although the contracts are held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced.

It was held in *White v. Franklin Bank*, 22 Pick. [Mass.], 181, that a suit could be maintained upon an entry in a deposit book made by defendant's cashier by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which the defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is laid down by Lord Kenyon in *Howson v. Hancock*, 8 T. R. [Eng.], 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyn, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting. When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit*

Storz v. Finklestein.

for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover. (2 Comyn, Law of Contracts, 109.)” The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows: “Dr. Franklin Bank, in account with B. F. White, Cr. 1837, Feb. 10th. To cash deposited, \$2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier.” This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute; the depositor was by no means *in pari delicto*, therefore he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in *Sackett’s Harbor Bank v. Codd*, 18 N. Y., 240, and the liability of the defendant was accordingly adjudged to exist.

The action in *Dill v. Inhabitants of Wareham*, 7 Met. [Mass.], 438, was to recover back the sum of \$500 paid by the plaintiff to the town of Wareham for the privilege of taking oysters within its limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow the privilege paid for, the suit was brought as indicated. Chief Justice Shaw, in delivering the opinion of the court, said: “In regard to the sum of five hundred dollars, as it appears that was received by the treasurer and went to the use of the town, and was so received in advance, upon a consideration which has

failed, it must be regarded as money had and received by the town to plaintiff's use; and therefore the action for that sum will lie."

In *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 Pick. [Mass.], 371, a note had been given by the rector and wardens of the church upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case it was an action by the lender of the money to recover the amount loaned, hence the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable as it might have been if the rector and wardens after having paid the note had sued the church society to recover the amount so paid.

The syllabus in *Whitney v. Peay*, 24 Ark., 22, begins with the statement: "The state issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof;" but this proposition cuts no special figure in the case, for these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge and of the assignee of such assignee among themselves as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledgor upon payment of the amount to secure which originally such pledge was made, notwithstanding the fact that by subsequent pledges of the bonds a loan of a larger sum had been effected.

The recovery of judgment in *Philadelphia Loan Co. v. Towner*, 13 Conn., 248, was for an amount loaned in Pennsylvania. It was held in this case that the laws of Pennsylvania should govern, and that as the charter of plaintiff

Storz v. Finklestein.

had provided that "nothing therein contained should be construed to authorize the company to discount notes," and the loan of money upon which the interest was reserved in advance constituted a discount, therefore no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory which was recognized by the supreme court of errors of Connecticut is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued and to loan money under certain restrictions, made a loan, and afterwards took a note as security in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in *Vanatta v. State Bank of Ohio*, 9 O. St., 27.

In *Foulke v. San Diego & G. S. P. R. Co.*, 51 Cal., 365, the opinion was very brief and was correctly summarized in this language of the syllabus: "The provision in the act concerning railroad corporations that 'no contract shall be binding on the company unless made in writing,' refers only to contracts wholly executory; but the action against the corporation on such verbal executory contracts must be brought upon an implied promise and the recovery must be limited to the value of the benefit received by the corporation." The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was therefore held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. (*Farmers Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 1 McCrary [U. S.], 247.)

In *Madison Avenue Baptist Church v. Baptist Church*

in *Oliver Street*, 73 N. Y., 82, there had been an attempted union of the two church societies under an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was *ultra vires*, but while the arrangement existed, and was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor, for the church supposed to have been merged in it. The court of appeals held that for money so paid, the church whose debt had been thus paid was liable.

In *Tracy v. Talmage*, 14 N. Y., 162, it was held that, although the vendor was a party to the illegal contract, he was not *in pari delicto* within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that where parties to a contract or transaction not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party.

In *United States Express Co. v. Lucas*, 36 Ind., 361, it was held that an agent who had received money for which the company was liable could not as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Morawetz, Private Corporations, section 721, it is shown to be extremely probable that no court, except such perhaps as may have been misled by his statements, has ever enforced the aforesaid principle laid down by Mr. Morawetz, that "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party must account to the latter for what has been so received." Equally without judicial sanction is his next proposition, that

"Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case." The correct rule was quoted from the language of Lord Mansfield in *Holman v. Johnson*, 1 Cowper [Eng.], 343, by Eyre, C. J., in *Lightfoot v. Tenant*, 1 Bos. & P. [Eng.], 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *ex dolo malo, non oritur actio*.—No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted." After this introduction Lord Mansfield stated the question to be, "whether the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly stated principles were recognized and enforced in *Spurgeon v. McElwain*, 6 O., 442; *Bancher v. Mansel*, 47 Me., 58; *Hubbell v. Flint*, 13 Gray [Mass.], 277; *Hull v. Ruggles*, 56 N. Y., 424; *Skiff v. Johnson*, 57 N. H., 475; *Aiken v. Blaisdell*, 41 Vt., 655; *Foster v. Thurston*, 11 Cush. [Mass.], 322; *Hooker v. De Palos*, 28 O. St., 251; *Ruckman v. Bryan*, 3 Den. [N. Y.], 340; *McKinnell v. Robinson*, 3 M. & W. [Eng.], 434; *Mosher v. Griffin*, 51 Ill., 184; *Raymond v. Leavitt*, 46 Mich., 447.

In *Wilde v. Wilde*, 37 Neb., 891, an action for divorce,

the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from *Luce v. Foster*, 42 Neb., 818: "When any portion of the consideration is illegal, the promise cannot be enforced unless there are several promises, and that which relates to the bad consideration can be distinguished and separated from the others. In other cases the promise is unenforceable. All the text-writers so state the rule. (See, for instance, Wharton, Contracts, 339; Anson, Contracts, 191; Pollock, Contracts, 338.) The rule is so well settled that a reference to adjudications is unnecessary." The first paragraph of the syllabus of *Gould v. Kendall*, 15 Neb., 549, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract, therefore such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of *Brooks v. Martin*, 2 Wall. [U. S.], 70, which by the supreme court of New Hampshire in *Manchester & L. R. Co. v. Concord R. Co.*, *supra*, was cited as a leading case in support of the erroneous doctrine stated in section 721 of Morawetz on Private Corporations. By this analysis it was clearly shown by Judge COBB that in the case of *Brooks v. Martin* a recovery was sanctioned, chiefly because between the parties litigant there had existed a partnership and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may fittingly be closed by quoting from the above mentioned opinion delivered by Judge COBB his quotation from the language of Chief Justice Marshall in *Armstrong v. Toler*, 11 Wheat. [U. S.], 268, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that

Hough v. Stover.

no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case. The judgment of the district court is

AFFIRMED.

IRVINE, C., did not take part in the determination of this case.

DAVID M. HOUGH ET AL., APPELLEES, V. JAMES E.
STOVER ET AL., APPELLANTS.

FILED DECEMBER 7, 1895. No. 5847.

1. **Erroneous Judgments: COLLATERAL ATTACK.** In a collateral proceeding a judgment irregularly rendered cannot be assailed on that ground, provided the court which rendered such judgment had proper jurisdiction.
2. **Review: CONFLICTING EVIDENCE.** Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court.

APPEAL from the district court of Douglas county.
Heard below before HOPEWELL, J.

Andrew Bevins and Lake, Hamilton & Maxwell, for appellants.

Henry P. Stoddart and William E. Healey, contra.

RYAN, C.

The appeal in this case is from a judgment subjecting certain real property in Douglas county to the payment of a judgment in favor of appellees against James E. Stover. This real property had been conveyed by James E. Stover

and his wife to William H. Duffield, by whom it was conveyed to Fred Bitterolf, whose daughter was the wife of James E. Stover.

The first question argued is that the judgment, for which the real property was decreed liable, was rendered against James E. Stover alone, whereas the action was brought against James E. Stover and Annie Stover, copartners as James E. Stover & Co. It is insisted that the judgment should have been rendered against the firm, for the reason that firm property should be applied to the payment of partnership indebtedness before the debt of an individual member of the firm should be paid therewith. This objection hardly comes with a good grace from the individual partner whose debt has been paid, and at any rate the judgment was not void. Possibly the district court, if its attention had been properly called to this condition of affairs in the suit wherein judgment was rendered against James E. Stover, might have corrected such irregularity, if found to exist, and require correction. It is clear, however, that the alleged irregularity can avail nothing in the case under consideration, for the court had jurisdiction of James E. Stover. (*Taylor v. Coots*, 32 Neb., 30; *Trumble v. Williams*, 18 Neb., 144.)

It would subserve no useful purpose to detail at length or even to epitomize the evidence upon consideration of which the district court found the conveyance of James E. Stover and his wife fraudulent as against creditors, for, as is quite common, it is found scattered through a series of transactions, each of which considered singly does not sufficiently establish fraud, yet, when considered in their relations to each other, the aggregation of proofs is quite convincing. It is sufficient for all purposes to say, generally, that there was sufficient proof of fraud to justify the finding made in that respect by the district court. Its judgment is therefore

AFFIRMED.

STATE OF NEBRASKA, EX REL. J. C. HOFFMAN ET AL.,
v. EUGENE MOORE, AUDITOR.

FILED DECEMBER 7, 1895. No. 7720.

1. **Municipal Bonds.** The validity of municipal bonds is not affected by an apparent irregularity which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters.
2. ———: **ANTEDATE: MANDAMUS.** January 10, 1895, the Boyd county board ordered an election for the purpose of voting on a proposition to issue funding bonds. The election was held February 19, and the proposition carried. The bonds were presented for registration in April. They were in exact conformity with the proposition submitted, bore interest at six per cent, matured twenty years after date, and were redeemable at the option of the county board ten years after date, but were dated January 2, 1895, this date being a portion of the proposition submitted to vote. *Held*, That the antedating of the bonds under these circumstances was not a substantial defect,

ORIGINAL application for *mandamus* to compel the respondent to register certain bonds of Boyd county. *Writ allowed.*

C. C. Flansburg, for relators.

A. S. Churchill, Attorney General, and W. S. Summers, Deputy Attorney General, contra.

IRVINE, C.

This was an original application by the county commissioners of Boyd county for a writ of *mandamus* to compel the respondent, as auditor of public accounts, to register certain bonds of Boyd county. In brief, the application for the writ discloses that on the 10th of January, 1895, the relators, as county commissioners, found and determined that the indebtedness of Boyd county, evidenced by

judgments, warrants, and claims, was \$20,000, and less than ten per cent of the assessed valuation of the county; that thereupon they ordered a special election to be held on the 19th day of February for the purpose of voting on the proposition of issuing bonds in the sum of \$20,000, for the purpose of funding such indebtedness; that the proposition submitted was for the issue of bonds in the sum of \$20,000, to be dated January 2, 1895, to draw interest at the rate of six per cent per annum, payable semi-annually, on the 2d day of July and the 2d day of January of each year, until said bonds should be paid, said bonds to run twenty years from the date thereof; provided, however, that they might be made redeemable at the option of the county board at any time after ten years from the date thereof. The proposition also provided for the place of payment and for sale at not less than par and for the levy of a tax to pay the bonds. It is further alleged that due notice of the election was given, the election held and canvassed, and said proposition found to have been carried; that on "the — day of April, 1895," the bonds having been prepared and executed in all respects in accordance with the proposition, were presented for registration and registration refused. To this application the respondent demurred. The only question argued in support of the demurrer was that arising from the fact that the bonds bore date January 2, 1895, while the election was not ordered until January 10, or held until February 19, and the bonds not in fact issued in April, when offered for registration. The statute authorizes such funding bonds to be issued after an election authorizing the same, "to run not more than twenty years nor less than five years, with interest at a rate not to exceed seven per cent per annum, payable semi-annually; * * * *Provided*, That such bonds may be made redeemable at any time after five years, at the option of the county board." (Compiled Statutes, sec. 133, art. 1, ch. 18.) It is also provided that whenever a bond of any county

shall be presented to the auditor for registration, the auditor shall detach as many interest coupons as shall mature before the first taxes levied to meet the same shall become due and collectible. (Compiled Statutes, sec. 37, ch. 9.) We think that in this case the antedating of the bonds in nowise affects their validity or regularity. If the effect of such antedating were to evade the operation of any law, the case would be different. Thus, if to antedate the bonds were in effect to provide a higher rate of interest than permitted by law or authorized by the voters, this would be a substantial defect, but the statute last cited, requiring the detaching of coupons, would render it impossible for any claim for interest to accrue prior to their actual registration. So if the effect of antedating were to make the bonds mature, or to make them redeemable in a shorter period than the law permits, this, too, would be a substantial defect. But the bonds might, under the statute, be made to mature in any time from five to twenty years. The proposition contemplated the antedating, and the bonds issued in conformity thereto would, therefore, mature within the statutory period. They might be made redeemable in any time, not less than five years. Under the proposition they were made redeemable in ten, so that the period of redemption was within the statute. The antedating of the bonds in nowise rendered them in conflict with the statute, or the proposition submitted to the electors, and was in no sense a matter of substance. The case must be distinguished from such cases as *Wood v. City of Louisiana*, 5 Dill. [U. S.], 122, *City of Louisiana v. Wood*, 102 U. S., 294, and *Anthony v. Jasper County*, 101 U. S., 693, where the antedating was for the purpose of evading a registration law, which went into operation between the date of the bonds and the time of their issue; and also from such cases as *Coler v. Cleburne*, 131 U. S., 162, where the bonds were antedated and signed by the person who was mayor at the day of their date, but not mayor at the time of their actual

execution. The case is more analogous to *Flagg v. Mayor of City of Palmyra*, 33 Mo., 440; *Commissioners of Marion County v. Clark*, 94 U. S., 278; *Township of Rock Creek v. Strong*, 96 U. S., 271; and *Dows v. Town of Elmwood*, 34 Fed. Rep., 114. In *Flagg v. Mayor of City of Palmyra*, the bonds in question were aid bonds, and were dated prior to the passage of the ordinance subscribing for the stock purchased with the bonds. In this case it is said: "This is the most plausible objection to the bond, but it is only plausible. The bond complies literally with the law, in being payable twenty years after date, and bearing eight per cent interest. The objection must then be that notwithstanding the literal compliance with the law, this is a substantial departure from the manifest intention. It does not appear to be so." In *Commissioners of Marion County v. Clark* the bonds were dated September 3, 1872, but not issued until November 4, following. The bonds ran thirty years, and the court held that this time should be computed in that case from the time the bonds were actually executed and delivered, apparently applying a statute of Kansas to that effect. Under this rule, the bonds would not exceed the lawful limit and they were held valid. In *Township of Rock Creek v. Strong* the bonds were dated September 10, 1872, payable thirty years from October 15, 1872. The court held that their legal effect was precisely what it would have been had the date been inserted October 15, and that the defect was not substantial. *Dows v. Town of Elmwood* is to the same effect. All these cases support the principle upon which we base the decision, to-wit, that such an irregularity as the present does not affect the validity of the issue, where it does not affect the substance of the transaction by operating an evasion of the law or a departure from the proposition ratified by the voters.

WRIT ALLOWED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.
HON. T. O. C. HARRISON, } JUDGES.
HON. T. L. NORVAL, }
HON. ROBERT RYAN, } COMMISSIONERS.
HON. JOHN M. RAGAN, }
HON. FRANK IRVINE, }

COMMERCIAL NATIONAL BANK OF OMAHA V. REUBEN
LIPP, ASSIGNEE OF E. F. HEMPSTEAD.

FILED JANUARY 9, 1896. No. 5771.

**Voluntary Assignments: FAILURE TO PRESENT CLAIMS: DIS-
TRIBUTION.** One who through his own fault and neglect fails
to present for allowance his claim against an assigned estate
within the time allotted therefor by law, in conformity with the
order of the county court, is forever barred, and will not there-
after be permitted to prorate with other creditors of the estate.

ERROR from the district court of Pawnee county. Tried
below before BUSH, J.

The opinion contains a statement of the case.

Montgomery, Charlton & Hall, for plaintiff in error:

Plaintiff in error should be permitted to present its claim for allowance and to share in the distribution of the assigned estate, though the claim was not filed within the time fixed by the county court. (*Powers v. Hill*, 27 Mo. App., 190; *Elwood v. Marsh*, 31 Neb., 134; *Clendenning v. Perrine*, 32 Neb., 159; *Owens v. Ramsdell*, 33 O. St., 439; *Carpenter v. Dick*, 41 O. St., 297; *Fourth Nat. Bank v. Scudder*, 15 Mo. App., 463; *Myers v. Board of Education*, 32 Pac. Rep. [Kan.], 658; *Maverick v. Heard*, 12 S. W. Rep. [Mo.], 892; *Downey v. May*, 19 Abb. N. C. [N. Y.], 177; *Beem v. Kimberly*, 72 Wis., 343; *Schrivver v. Holderbaum*, 75 Ia., 33; *Smith v. McFadden*, 56 Ia., 482; *Ury v. Bush*, 52 N. W. Rep [Ia.], 666.)

Where a claim is contingent upon the result of a lawsuit, it may be filed and allowed after the determination of such suit, though the day limited for such filing has passed. (*Morgan v. Gibson*, 42 Mo. App., 234; *Tenny v. Lasley*, 80 Mo., 664; *Senat v. Findley*, 51 Ia., 20; *Farwell v. Myers*, 64 Mich., 234; *Suppigar v. Graaz*, 27 N. E. Rep. [Ill.], 22; *In re Van Norman*, 43 N. W. Rep. [Minn.], 334.)

Story & Story, contra:

Plaintiff in error should not be permitted to file its claim and have the same allowed out of time.

Plaintiff in error made its election between two remedies and is not in a position to invoke the power of a court of equity for an extension of time in which to file and prove its claim. (*Valentine v. Decker*, 43 Mo., 583; *McKindley v. Nourse*, 24 N. W. Rep. [Ia.], 750; *Lovenberg v. Nat. Bank of Texas*, 67 Tex., 440; *Clendenning v. Perrine*, 32 Neb., 155.)

While published notice of the time to file claims was sufficient, plaintiff in error had actual notice, and its claim is barred. (*Carter v. Lee*, 47 N. W. Rep. [Ia.], 1014.)

Post, C. J.

From July 1, 1889, until December 21, following, one E. F. Hempstead was engaged in the business of banking at Pawnee City, in this state, under the name and style of the Nebraska State Bank of Pawnee City. He was also engaged in furnishing electric lights under the name and style of the Pawnee City Electric Light Company. On the day last mentioned said Hempstead made an assignment for the benefit of all his creditors to A. D. Strunk, sheriff of said county. The inventory of assets executed December 30 includes the banking house and all credits of the bank; also the premises upon which was situated the electric light plant, together with all lights, lamps, wires, poles, and property of every description pertaining thereto. On the 15th day of January, 1890, a meeting of the creditors was held pursuant to notice by the county judge, at which the defendant herein was selected to succeed Strunk, the sheriff, in the execution of said trust, and in due time qualified in the manner prescribed by statute. Shortly thereafter an order was made by the county judge, requiring all claims against said estate to be presented for examination and allowance on or before March 12, 1890, notice of such order being given by publication in a local newspaper for the period of three weeks. Hempstead, for some time prior to his assignment, kept an account with the plaintiff in the name of the Nebraska State Bank of Pawnee City and had a short time previous to said date procured the plaintiff to discount certain notes, in all of which the Nebraska State Bank was named as payee. On the 13th day of January, 1890, said plaintiff commenced an action in the district court for Pawnee county in which the Nebraska State Bank of Pawnee City was

named as defendant, in which it sought to rescind the contract, under which it held the notes above mentioned, on account of the alleged fraudulent representations of Hempstead, and to recover the consideration paid therefor. An order of attachment was issued in that case, by virtue of which the banking house and assets of the bank were seized under the direction of the plaintiff, on the theory that the Nebraska State Bank was a body corporate, and that its property accordingly did not pass to the assignee above named. In said action the defendant Lipp was permitted to intervene, and on his motion the attachment was discharged by the district court, which order this court subsequently affirmed, holding that the Nebraska State Bank was not a body corporate, and that the assets of the bank passed to the assignee of Hempstead and his successor. (See *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb., 292.) Thereafter, on the 28th day of October, 1891, the plaintiff instituted this proceeding before the county judge seeking to have its said claim allowed against Hempstead's estate, which is insolvent and will not pay more than ——— per cent of the claims already allowed. Issue was joined by the answer of the assignee and a hearing had, resulting in a ruling adverse to the plaintiff, who prosecuted an appeal therefrom to the district court of Pawnee county, which resulted in a judgment affirming the order of the county judge and dismissing the appeal, and which has been removed into this court by the petition in error of the plaintiff bank.

The pleadings upon which the cause was tried in the county court and also in the district court are exceedingly voluminous. However, a brief reference to them will suffice in this opinion. Notwithstanding the fact that this cause originated before the county judge, it is in the nature of a proceeding in equity, and must be determined by the application of equitable principles. The petition, which is the basis of the proceeding, was presented to the county

judge long after the limit fixed for the presenting of claims against the estate, and the sole ground upon which relief is sought is that the plaintiff was not aware until the decision of this court in *Commercial Nat. Bank v. Nebraska State Bank*, *supra*, that it had a claim against Hempstead, and was not advised until about the time of the filing of said petition, to-wit, October 28, 1891, that a time had been fixed for the presentation of claims against said estate. It is provided by section 16 of the assignment law (ch. 6, Compiled Statutes): "Upon the day of the meeting of the creditors the county judge shall fix a day, not more than sixty and not less than thirty days thereafter, within which all claims against the assigned estate shall be filed, and within which the assignee or assignor, or any creditor, may file any objection, defense, set-off, or counter-claim.

* * * Notice of the time so fixed shall be given in the manner hereinbefore provided for notice of the first meeting of the creditors. Any claim, objection, set-off, or counter-claim not filed on or before the date so named shall be forever barred from being considered in the settlement of said estate or participating in any dividend therein." Provision is by section 9 made for the notice here referred to by advertisement in some newspaper published and of general circulation in the county, and for the mailing of a copy thereof to each creditor mentioned in the inventory, addressed to his place of residence therein named, with postage prepaid. It is further provided: "No informality or neglect with reference to such notice shall invalidate any action taken pursuant thereto or to such order." Similar provisions have been construed as directory merely, and the claimant, in a proper case, allowed to share in the assets of the assigned estate, notwithstanding the failure to present his claim for allowance within the allotted time. But is this plaintiff in a position to invoke that rule? We think not. There is not alone an absence of evidence tending to prove ignorance on its part, of the order in question,

Home Fire Ins. Co. of Omaha v. Berg.

but there is positive evidence that it was fully advised of the time fixed for the presentation of claims. A consideration of the whole record can lead to but one conclusion, viz., that the plaintiff, with a knowledge of all the facts, elected to ignore the assignment in so far as it applied to the assets of the bank and is now chargeable with the consequences of the election thus deliberately made, for, as held in *Clendenning v. Perrine*, 32 Neb., 155, a creditor who through his own fault fails to present his claim within the time limited therefor by law is barred from participating in any distribution of the estate of the assignor. It follows that the claim of the plaintiff is without merit and that the judgment of the district court must be

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V.
BERG & STORY.

FILED JANUARY 9, 1896. No. 5902.

1. **Pleading.** New matter constituting a defense in whole or in part is not available under a general denial, but should be specially pleaded.
2. **Evidence: ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS.** Information voluntarily entrusted to an attorney at law, where the relation of attorney and client does not exist, is not a privileged communication under the provisions of the Code of Civil Procedure.

ERROR from the district court of Adams county. Tried below before BEALL, J.

B. F. Smith and Jacob Fawcett, for plaintiff in error.

Capps & Stevens, contra.

Post, C. J.

This action originated in the county court for Adams county on a policy of insurance for \$400, issued by the plaintiff in error, defendant below, to one Louis Carroll on a certain Clydesdale stallion, eight years old, of the value of \$1,600. The cause was in due time removed to the district court of said county, where a trial was had, resulting in a verdict and judgment for the plaintiff in the sum of \$200, and which has been removed into this court for review upon the petition in error of the defendant therein.

It is in the petition below, among other things, alleged that after the death of the horse insured, and after a cause of action had accrued on the policy, said Carroll, for a valuable consideration, assigned and transferred to the plaintiff a one-half interest therein, of which the defendant was in due form notified. The answer, after admitting the issuance of the policy and the death of the horse above mentioned, denies each and every other allegation of the petition, and concludes as follows: "Defendant further answering says that it has paid and settled for the loss of said horse so insured before the bringing of this suit and denies that it is indebted to Louis Carroll or Berg & Story for said loss of said horse in any sum whatever." The allegations of the petition were fully sustained by the proofs adduced at the trial, the assignment referred to therein being in writing under date of July 8, 1891, the loss having occurred June 27, previous.

On the part of the defendant it was attempted to show (1) a recession by Carroll of the assignment to the plaintiff; (2) a subsequent settlement and discharge by Carroll, the insured. The liability of the defendant company on the policy of insurance being admitted and the assignment being clearly established, it follows that the judgment should not be disturbed unless perhaps on the ground that the contract of assignment was, as claimed, rescinded by Car-

roll; but however meritorious that defense might have been under other circumstances, it is not available to the defendant company in this action. There is no rule of pleading more firmly established under our Code than that new matter constituting an entire or partial defense must be specially pleaded. (Code of Civil Procedure, sec. 99.) Inasmuch as the answer contains no reference to a recession of the assignment, further reference to the subject would be out of place in this opinion.

The only other assignment of error calling for notice is the overruling of the objection to the testimony of Mr. Olmstead on the ground that the communication sought to be elicited was privileged, having been made to the witness while acting as attorney for the defendant. The purpose of the evidence was to prove notice to the defendant company of the assignment by Carroll to plaintiffs and was without doubt admissible, since it is clearly shown from his *voir dire* examination that he did not at any time stand in the relation of attorney for the defendant. His answers, it is true, disclose the fact that while he did at one time appear for the defendant in the county court in the belief that he had been retained for that purpose, he was soon thereafter advised by Mr. Barber, secretary of the company, that his appearance was unauthorized. But, assuming the relation of attorney and client to have in fact existed, the evidence was nevertheless admissible, since it was in no sense a privileged communication, but was confined to a statement that the adjusting agent of the defendant company, having insurance on the horse in question, saw and examined the written assignment from Carroll to the plaintiffs. There being no error in the record the judgment is

AFFIRMED.

JULIUS S. COOLEY V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6690.

Contempt: SUFFICIENCY OF COMPLAINT. A complaint is insufficient as the foundation of proceedings for constructive contempt which fails to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder or embarrass it in the administration of justice.

ERROR to the district court for Douglas county. Tried below before AMBROSE, J.

David Van Etten, for plaintiff in error.

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *W. W. Slabaugh*, for the state.

POST, C. J.

This is a petition in error to review a judgment of the district court for Douglas county whereby the plaintiff in error was adjudged guilty of contempt of court. The basis of the prosecution below is the following order entered by the district judge on his own motion:

"STATE OF NEBRASKA	}
v.	
JULIUS S. COOLEY AND THEODORE GALLIGHER.	

"It now appearing to the court that one Julius S. Cooley has used fraudulent means and imposed upon Charles J. Karbach in the obtaining of a certain affidavit of the said Charles J. Karbach recently filed in case entitled *George A. Hoagland v. Emma L. Van Etten et al.*, docket X, No. 375, of this court, and it further appearing to the court that one Theodore Galligher has used fraudulent means and imposed upon George H. Fitchett and E. C. Garvin,

Cooley v. State.

respectively, in the obtaining of certain affidavits of the said Garvin and Fitchett recently filed in case entitled George A. Hoagland v. Emma L. Van Etten et al., docket X, No. 375, of this court. It further appearing that the said Julius S. Cooley and Theodore Galligher procured the said affidavits of the parties as above set forth, knowing and intending that said affidavits were to be filed in this court to be used upon the hearing of said cause, to-wit, George A. Hoagland v. Emma L. Van Etten, and that the said Galligher and Cooley intended thereby to impose upon this court.

"It is therefore ordered that a *capias* issue forthwith to the sheriff of Douglas county, Nebraska, commanding him to bring the said Julius S. Cooley and Theodore Galligher before this court at 9:30 o'clock Wednesday morning next to show cause why they and each of them should not be punished for contempt of this court.

"G. W. AMBROSE,

"Judge."

Upon the entry of the foregoing order a *capias* was issued, by virtue of which the plaintiff in error was arrested and at a subsequent day of the term was adjudged guilty as charged in said order and sentenced to imprisonment in the county jail for the period of ten days and to pay a fine of \$50, together with the costs of the prosecution. The question of the sufficiency of the said order was raised at every stage of the proceeding and also by the petition in error. It has been frequently said that the proceeding for contempt under our system is in the nature of a criminal prosecution and that the same degree of certainty is required in stating the offense as in prosecutions under the Criminal Code. (*Gandy v. State*, 13 Neb., 445; *Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *Percival v. State*, 45 Neb., 741; *Hawes v. State*, 46 Neb., 149.) That rule is especially applicable to acts which, although not committed in the presence of the court, tend

to embarrass or prevent the orderly administration of justice and which are known as constructive contempts.

In *Gandy v. State*, *supra*, it is said: "The proceeding against a party for constructive contempt must be commenced by an information under oath, specifically stating the facts complained of; an attachment may then be issued, or order to show cause." In that case the information, which was prepared and filed by the district attorney, after describing a certain cause then on trial to which the defendant therein was a party, alleged that the said defendant "did wilfully attempt to obstruct the proceedings and hinder the due administration of justice in said suit, then and there depending and on trial as aforesaid before said district court, in this, to-wit: By attempting to procure one George A. Abbott, Jerry Ackerman, and other persons whose names are to this affiant and informant unknown, to unlawfully seek, strive, and attempt to corrupt and influence the jurors, to-wit, * * * in their action, judgment, and decision * * * in said suit." In the opinion reversing the judgment of conviction MAXWELL, J., says: "In the case at bar there is not a single fact alleged showing an attempt on the part of the defendant to improperly influence jurors. That is there is no statement of what he did. The information therefore fails to state an offense."

In *State v. Henthorn*, 46 Kan., 613, the court say: "It is error to issue an attachment, warrant, or order of arrest for an alleged constructive contempt, without an affidavit or information containing a statement of the facts constituting the alleged contempt having first been filed with the court." (See, also, to the same effect, *In re Holt*, 27 Atl. Rep. [N. J.], 909; *Wilson v. Territory*, 1 Wyo., 155; *In re Daves*, 81 N. Car., 72; *Ex parte Wright*, 65 Ind., 508; *Rapalje*, Contempt, 43.)

We must not be understood as intimating that proceedings for constructive contempt may not be instituted by the court or judge. On the other hand, it is the right, if not

Galligher v. State.

indeed the duty, of the tribunal whose power is defied, or whose process is obstructed, to take notice of that fact without waiting for an informant who is usually more interested in asserting his personal rights than in the vindication of the court. It is probable, too, that an order like that entered in this case is a sufficient foundation for the proceedings; but to have that effect it must contain the allegation essential to confer jurisdiction in a prosecution by affidavit or complaint. When tested by that rule, the order mentioned is clearly insufficient. If this conviction can be sustained, it must be upon the allegation that the accused "has used fraudulent means and imposed upon one Charles J. Karbach in the obtaining of a certain affidavit." Here, as in *Gandy v. State*, there is alleged no facts from which it can be found or inferred as a matter of law that the act of the accused was a fraud upon Karbach, the affiant named, or that its effect was to impose upon or embarrass the court in the administration of justice. Such a statement would be indefensible in an action for relief on the ground of fraud, not to mention a criminal prosecution. The judgment is reversed and the prosecution dismissed.

REVERSED.

THEODORE GALLIGHER V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6691.

Sufficiency of Complaint for Constructive Contempt.

ERROR to the district court for Douglas county. Tried below before AMBROSE, J.

David Van Etten, for plaintiff in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and W. W. Slabaugh, for the state.

Post, C. J.

This was a proceeding against the plaintiff in error for contempt of court and is submitted upon the record which was examined in the case of *Cooley v. State*, 46 Neb., 603, and for reasons therein stated, the judgment of conviction is reversed and the prosecution dismissed.

REVERSED.

ORMA LAWHEAD V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7858.

1. Indictment and Information: DUPLICITY: BURGLARY.

Different criminal acts constituting parts of the same transaction, such as burglary with intent to steal particular property, and the stealing of such property, may be charged in the same indictment or count thereof. (*Aiken v. State*, 41 Neb., 263.)

2. Larceny: EVIDENCE: INSTRUCTIONS. It is not error in a prosecution for larceny to charge that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction upon which they would act in their own most important affairs or concerns of life." (*Polin v. State*, 14 Neb., 540; *Willis v. State*, 43 Neb., 102.)

3. Criminal Law: INSTRUCTION AS TO PENALTY. Where the jury have been fully advised respecting the distinction between grand larceny and petit larceny, it is not error for the trial court to add that they have nothing to do with the question of the penalty, and that it is their duty to render a verdict in accordance with the evidence without regard to its effect upon the accused. (*Ford v. State*, 46 Neb., 390.)

4. Instructions. Certain instructions held properly refused, the

Lawhead v. State.

propositions therein embraced having been given by the court on its own motion in language quite as favorable to the accused.

5. **Larceny: EVIDENCE.** Evidence examined, and *held* to sustain the conviction on the charge of larceny.

ERROR to the district court for Buffalo county. Tried below before SINCLAIR, J.

F. G. Hamer and *Greene & Hosteller*, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, for the state.

POST, C. J.

The plaintiff in error was by the district court for Buffalo county adjudged guilty of grand larceny and sentenced to a term in the penitentiary, which judgment he now seeks to have reversed by means of a petition in error addressed to this court.

1. The first proposition to which we will give attention is that the verdict is contrary to law, for the reason that the indictment includes in the same count a charge of burglary as well as of larceny. The charge is in the usual form and concludes as follows: "Then and there being found in said barn, feloniously and burglariously did steal, take, and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It is said by counsel, "The stealing that is here charged is a burglarious stealing. * * * If the answer be that he is charged with both burglary and theft, I reply that he cannot be so charged in the same count, and that the indictment is bad for duplicity." To that proposition we cannot give our assent. It is, on the contrary, firmly established by authority that burglary and larceny, where each constitutes part of the same transaction, may be charged in the same count, and

the defendant may be found guilty of larceny only. (*Aiken v. State*, 41 Neb., 263, and authorities cited.)

2. It is next alleged that the court erred in giving the following instructions on its own motion: "The court instructs you that by a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means an actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction on which they would act in their own most important concerns and affairs of life." The specific objection to the foregoing instruction, as made in the motion for a new trial, is to the last sentence or paragraph thereof. That portion of the instruction to which the criticism is directed is a substantial copy of the charge approved by this court in *Polin v. State*, 14 Neb., 540, *Langford v. State*, 32 Neb., 782, and *Willis v. State*, 43 Neb., 102. The use of the qualifying word "ordinary" instead of "ordinarily," as in the instruction approved, is probably the result of an error in transcribing; but however that may be, the variance is unimportant and presents a question of grammatical construction rather than a question of law.

3. During the deliberation of the jury the following proceedings were had as disclosed by the record:

"Question by jury: 'What is the difference in punishment between grand larceny and petit larceny?'"

"Answer by the court: 'Grand larceny is where the property stolen is of the value of \$35 or upwards, and punishable by confinement in the penitentiary not less than one year and not more than seven years. Petit larceny is where the property stolen of the value less than \$35 and is punishable by imprisonment in the county jail not exceeding thirty days, and in addition may be fined \$100, and

also to make restitution to the owner of the property stolen in double its value. The court desires to add that it answers these questions in the hope that it may help your investigations, but desires to say further that it is your duty to pass upon the evidence and declare your verdict thereon irrespective of what the punishment may be. This matter is for the court. You have done your whole duty when you have passed upon the facts as shown by the evidence."

Exception was taken to the cautionary language with which the foregoing instruction concludes, and which exception is the ground of the next assignment of error. The question here presented was practically determined in *Ford v. State*, 46 Neb., 390, where it was said that "where the jury are not required to fix the punishment in a criminal prosecution, it is not error for the trial judge to refuse to instruct them as to the penalty prescribed by statute for the offense, or to permit that question to be argued to the jury." The only difference between that case and the case at bar is that in the former counsel were refused permission to comment upon the penalty for larceny in their argument to the jury, while in the latter the question was disposed of by the instruction. The court, therefore, did not err in the ruling assigned.

4. Certain witnesses for the state had been employed as detectives to procure evidence against the accused, and instructions requested by the latter regarding the weight to be given the testimony of such witnesses were refused, and which refusal is also assigned as error. The request of the accused was based upon the holding of the court in *Preuit v. State*, 5 Neb., 377, and in *Heldt v. State*, 20 Neb., 492. But the same proposition had been given in the charge of the court in language deemed by us more appropriate than that employed in the instruction approved in *Preuit v. State*. The trial court did not err, therefore, in refusing the request above mentioned.

5. The accused and Joseph Roof were jointly charged

with burglariously breaking and entering a certain barn, the property of one Paist, with intent to steal harness, corn, and other property and with the actual theft of the property therein described. Roof, it appears, was soon thereafter arrested and confessed to his participation in the theft, and also implicating the accused in said crime. In pursuance of an understanding with the former, two witnesses for the state, Gass and Overmire, secreted themselves in his cell, when, according to said witnesses, the following conversation was had, quoting from the testimony of Overmire: "Sheriff Nutter brought Lawhead in there and Roof sat on a chair toward the back end of the hall-way, and said to him, 'You can stay in there,' and then he [Nutter] went upstairs. Lawhead said, 'Hello, old man, you are here, are you?' Roof said, 'Yes, I'm here.' Lawhead said, 'How are you feeling?' Roof said, 'Pretty badly.' Lawhead said, 'Well, you old cuss, if you had not given me away as you did, we would both have been out of here.' Roof said, 'I told you not to take the harness. If you had not it would have been all right.' Lawhead said, 'I know that, but I would not give a man away.' * * * Roof said, 'What did you do with the harness?' Lawhead said, 'If I told you, you would go and tell the officers right away and it would put us both in the pen.' He said he needed the harness in his business, and Roof was kicking all the time about the harness." The foregoing statement is corroborated by Gass, although it is denied *in toto* by the accused. This evidence, it is strenuously insisted, is insufficient to sustain the judgment of conviction, and that the verdict should have been set aside upon that ground. But we think otherwise. According to the settled law of the state, a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused. (*Olive v. State*, 11 Neb., 1; *Lamb v. State*, 40 Neb., 312.) :

State v. Holcomb.

In the case at bar the larceny is, as we have seen, clearly proved and is practically admitted by counsel. Roof, the accomplice, was found in possession of a part of the stolen property, and the admissions of the accused, without doubt, strongly tend to connect him with the perpetration of the crime. The evidence appears to have satisfied the jury beyond a reasonable doubt of his guilt. They were properly cautioned regarding the credit due to the testimony of the witnesses of the state, but they were, after all, the judges of the weight of the evidence, and to interfere with their verdict would be a reversal of the oft-asserted and firmly established rule of the court.

There are other propositions discussed in the brief by counsel. We have, however, noticed all questions presented by the record before us. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE W. LEIDIGH,
WARDEN OF THE STATE PENITENTIARY, V. SILAS
A. HOLCOMB, GOVERNOR, ET AL.

FILED JANUARY 9, 1896. No. 8057.

1. **Constitutional Law: STATUTES: MANAGEMENT OF PENITENTIARY.** The provision of section 32, act of March 4, 1870 (Session Laws, 1870, p. 31), that all transactions and dealings of the state penitentiary shall be conducted in the name of the warden thereof, "who shall be capable in law of suing and being sued in all courts and places, in all matters concerning the said prison, by his name of office," conflicts with section 19, article 5, of the constitution of 1875 creating the board of public lands and buildings, and defining their duties, as well as the act of February 13, 1877 (Session Laws, 1877, p. 188), and was thereby repealed.

2. **Warden of Penitentiary: BOARD OF PURCHASE AND SUPPLIES: MANDAMUS.** Independent of statute, an action may be maintained on the relation of the warden of the penitentiary against the board of purchase and supplies to require them to provide the necessaries for the support of the penitentiary, in accordance with the provisions of the act of February 15, 1877, entitled "An act to regulate the purchase of supplies for the public institutions, and the executive departments of the state" (Session Laws, 1877, p. 199), since the object of such a proceeding is not the vindication of a mere private right of the relator, but the enforcement of a public duty which the respondents owe to the state.
3. ———: **POWERS AND DUTIES.** The powers and duties of the warden of the penitentiary are defined by the act of 1870 (General Statutes, 1873, p. 1031, ch. 76), and he continues to be, as originally designed, merely the keeper of the prison, subject to the management and control of the board of public lands and buildings, as the successor of the board of inspectors created by said act.
4. **Board of Public Lands and Buildings: CONVICT LABOR: LEASE.** The power conferred upon the board of public lands and buildings by section 17 of the act of February 13, 1877 (Session Laws, 1877, p. 194), to lease the convict labor of the state for a period not exceeding ten years, is not a continuing power, but was on the contrary exhausted by a single user.
5. **Statutes: TITLE OF ACT: CONSTITUTIONAL LAW: CONVICT LABOR.** Section 5 of the act of 1895, providing for the leasing of the convict labor until the last day of the next session of the legislature, is not within the title of said act, to-wit, "An act to annul a contract between the state of Nebraska and W. H. Dorgan, alleged assignee of C. W. Mosher, for leasing the penitentiary, penitentiary grounds, and convict labor of the state of Nebraska, * * * and to repeal all acts and parts of acts in conflict with the provisions of this act" (Session Laws, 1895, p. 237, ch. 66), and is therefore in conflict with the provision of section 11, article 3, of the constitution requiring the subjects of acts to be clearly expressed in their titles.
6. ———: ———: ———: ———. It is apparent from the whole of said act, including the title and preamble, that the words "for leasing the penitentiary, penitentiary grounds, and convict labor," as employed in the title thereof, are descriptive merely of the contract referred to, and not embracing a separate and distinct subject of legislation.

7. **Duties of Board of Public Lands and Buildings: CONVICT LABOR: LEASE.** The board of public lands and buildings is by section 19, article 5, of the constitution and the act of February 13, 1877 (Session Laws 1877, p. 188), invested with the general management and control of all of the public institutions of the state, except those for educational purposes, and may, in its discretion, lease the convict labor, penitentiary grounds, shops, and machinery therein, together with any property connected with or incident thereto.
8. ———: ———: ———. It is within the power of the board of public lands and buildings to provide by contract for the feeding and clothing of the convicts in the penitentiary as one of the considerations for the leasing of their labor; and such an agreement with a responsible lessee, who is ready and willing to perform the conditions of his obligation, would be a sufficient justification in a proceeding of this character.
9. ———: ———: ———. The contractor or lessee cannot, even with the assent of the board of public lands and buildings, usurp any of the functions of the warden as the keeper of the prison, although he may, and doubtless should, be accorded such privileges, consistent with the rules prescribed for the government of the prison and the health and safe-keeping of the convicts, as are necessary to carry into execution his agreement with the state.
10. ———: **AGENTS.** It being impossible for the board of public lands and buildings to personally direct the management in detail of the numerous public institutions of the state, they must, from the necessities of the case, transact much of the business pertaining to such institutions through agents of their own creation.
11. ———: ———: **CONVICT LABOR.** In the absence of statutory restriction, express or implied, it is within the power of said board to appoint an agent on behalf of the state to lease or manage the convict labor as well as the shops and machinery within the penitentiary.
12. ———: ———: ———. Except when furnished by the contractor pursuant to an agreement with the state, the method prescribed by statute (Session Laws, 1877, p. 199) for procuring supplies for the support of the penitentiary is exclusive, and the board of public lands and buildings cannot delegate to an agent of their own selection the disbursement of money appropriated for that purpose.

13. ———: ———: ———: CONSTRUCTION OF CONTRACT. Contract relied upon by respondents examined, and held a mere appointment of B., the alleged contractor, as agent of the state to lease the convict labor to third parties and to disburse the funds appropriated for the support of the penitentiary.
14. State Treasurer: PUBLIC FUNDS. The state treasurer, and not the chairman of the board of public lands and buildings, is charged with the general duty of receiving and disbursing the public funds, hence the latter is not chargeable upon his official bond with money of which the former is the lawful custodian.
15. Contracts: CONSIDERATION. Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum*.

ORIGINAL application for *mandamus* to compel the members of the state board of purchase and supplies to meet with the relator and make estimates, and purchase provisions and supplies for the penitentiary. *Writ allowed*.

Darnall & Kirkpatrick, for relator:

Reference was made to the following cases: *White v. City of Lincoln*, 5 Neb., 505; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 254; *Miller v. Hurford*, 11 Neb., 381; *Dawson County v. McNamar*, 10 Neb., 276; *Trumble v. Trumble*, 37 Neb., 340; *People v. Denahy*, 20 Mich., 349; *Weigel v. City of Hastings*, 29 Neb., 379; *State v. Nomland*, 3 N. Dak., 427; *State v. Bartley*, 41 Neb., 277; *State v. Wallich*, 12 Neb., 407, 15 Neb., 457, 609; *State v. Board of Public Lands & Buildings*, 7 Neb., 42; *State v. Bacon*, 6 Neb., 286; *In re Board of Public Lands & Buildings*, 18 Neb., 340, 37 Neb., 425; *Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Stone v. Green*, 3 Hill [N. Y.], 472; *State v. Maccuaig*, 8 Neb., 215; *State v. Howe*, 28 Neb., 618.

A. S. Churchill, Attorney General, and *George A. Day*, Deputy Attorney General, contra, cited: *State v. Stout*, 7 Neb., 89; *State v. Lancaster County Bank*, 8 Neb., 218; *In*

State v. Holcomb.

re Appropriations, 25 Neb., 665; *Van Horn v. State*, 46 Neb., 62; *State v. Whittemore*, 12 Neb., 252; *State v. Ream*, 16 Neb., 681; *Stricklett v. State*, 31 Neb., 674; *Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409; *People v. Mahaney*, 13 Mich., 481; *State v. Bemis*, 45 Neb., 724; *Lewis v. Stout*, 22 Wis., 236; *Commonwealth v. Green*, 58 Pa. St., 226; *Board of Supervisors v. Heenan*, 2 Minn., 281; *Bright v. McCullough*, 27 Ind., 223; *Indiana C. R. Co. v. Potts*, 7 Ind., 681; *City of St. Louis v. Tiesel*, 42 Mo., 589; *Curry v. Elvires*, 3 Vroom [N. J.], 363; *State v. Squires*, 26 Ia., 345; *State v. County Judge of Davis County*, 2 Ia., 280.

Post, C. J.

This is an original application for a writ of *mandamus*, on the relation of George W. Leidigh, as warden of the state penitentiary, to compel the respondents, as members of the board of purchase and supplies, to meet with the relator as such warden and make an estimate of the supplies necessary for the maintenance of said penitentiary for the current quarter, to advertise for bids therefor, and make contracts for such supplies in accordance with the provisions of the act approved February 15, 1877. (Compiled Statutes [ed. 1895], sec. 2, art. 12, ch. 83.) It is by the act mentioned made the duty of said board, consisting of the governor, commissioner of public lands and buildings, secretary of state, treasurer, and attorney general, at least one month previous to the first days of January, April, July, and October of each year, to meet with the warden of the penitentiary and superintendent of each of the asylums or other public institutions and determine the supplies necessary for such institutions for the quarter next ensuing, and which shall be contracted for by said board in the manner therein prescribed after advertisement in a newspaper having a general circulation in the state. It is further provided that no bids shall be considered unless accompanied

by the bonds of the proposed contractors in such amount and with such conditions as the board may prescribe, and that all supplies not furnished in accordance with the provisions of said act shall be purchased under the written instructions of said board. The respondents, except the governor (who refuses to join in resisting the relator's demand) having waived the issuance and service of the alternative writ, have filed a pleading in the nature of an answer, in which it is in substance alleged that the board of public lands and buildings, in the exercise of the authority conferred by the constitution and statutes of the state, on the 3d day of September, 1895, leased to A. D. Beemer, until the last day of the next session of the legislature, all of the convict labor in said prison, together with the grounds, yards, shops, and machinery pertaining thereto; that one of the considerations for said lease was the agreement by the said Beemer to suitably feed and clothe the convicts confined in said prison. It is further alleged that said lessee has been since the date named, and now is, ready and willing to furnish all of the supplies required for said prison and the convicts therein as by his lease provided, but that the relator has ever since said date refused, and still refuses, to accept from said lessee any supplies, or to permit him to employ any of said convicts. The lease above mentioned is here set out at length:

"This agreement, made and entered into at Lincoln, Nebraska, on this 3d day of September, A. D. 1895, by and between the state of Nebraska and H. C. Russell, J. A. Piper, A. S. Churchill, and J. S. Bartley, for and on behalf of said state, as the board of public lands and buildings of the state of Nebraska, parties of the first part, and A. D. Beemer, of Beemer, Cuming county, Nebraska, party of the second part,

"Witnesseth, that the said parties of the first part hereby grant, let, and lease to A. D. Beemer all of the property inventoried by the appraisors and umpire and purchased of

William H. Dorgan for the use and benefit of the Nebraska state penitentiary, also the labor of the prisoners confined in the penitentiary of the state of Nebraska, and all the grounds, shops, yards, and buildings and outbuildings connected with the same, and the appurtenances thereunto belonging (not hereinafter reserved), and all property belonging to the state, and the machinery for running the several branches of industry and used for the care and maintenance of the convicts therein until the last day of the session of the next session of the legislature, and agree to pay to the said A. D. Beemer the cost of feeding, clothing, and necessary expense for the care of said prisoners, and to pay the salaries of the warden, deputy warden, surgeon, and chaplain, turnkeys, usher, night watch, cell-house keepers, keeper in kitchen, and all necessary guards for the care and control of said prison and prisoners, for which the said first party agrees to pay not to exceed forty cents per day for each convict. In consideration whereof the said A. D. Beemer is to secure and furnish all possible labor for the convicts confined in said prison and to keep said convicts employed at the best possible wages, and to use his best energy and endeavor to keep them so employed, and to conduct the business of the prison in an energetic and economical manner, and to make all necessary improvements in said prison that the board of public lands and buildings may direct, to keep all the buildings, shops, yards, and grounds in a good condition, and to preserve the same from all possible damages. That the said A. D. Beemer is to have and exercise exclusive right to assign convicts to trades and occupations, to the running and management of all machinery belonging to the state and under his control, and shall see that the food furnished said prisoners is wholesome, and the clothing furnished is suitable to the comfort and health of the prisoners. For all purposes between the parties to this contract ten (10) hours shall be regarded as constituting a day's labor.

"The said A. D. Beemer, party of the second part, shall make a report on the 1st and 15th days of each month to the chairman of the board of public lands and buildings of all moneys received and paid out by him, of all his acts and doings connected with his management and control of said prison and prisoners, and to pay over to said chairman all moneys in his hands on the 1st day of each month when required by the board, less \$250 per month; provided that not more than \$3,000 shall be retained in any one year; and provided further, that said Beemer shall keep and have a competent book-keeper, to be paid out of the \$3,000 retained by him. He shall keep an inventory of all property coming into his hands as lessee and turn over or account for the same at the expiration of his lease in as good condition as the same now is, reasonable damage by use, wear and tear, loss by fire, the acts of God, and public enemies excepted. He shall [have] the full right to control and manage all property and machinery necessary for the employment, care, and maintenance of the convicts.

"The employment of outside labor by the lessee shall be subject to the approval of the board of public lands and buildings.

"The state reserves the right to make any and all temporary or permanent improvements and buildings pertaining in any manner to the penitentiary or any part or portion thereof, and the right to use any of the prisoners, grounds, and buildings free of charge during the time of construction.

"This contract shall take effect and be in force from and after the 3d of September, A. D. 1895, and the execution of a bond by said A. D. Beemer, with good and sufficient surety to the satisfaction and approval of the board of public lands and buildings of the state of Nebraska, in the penal sum of one hundred thousand (\$100,000) dollars, conditioned for the faithful performance by the said A. D. Beemer of all the stipulations and agreements on his be-

half in this contract contained. The state reserves for the use of the officers and guards the following rooms, to-wit: Rooms used by the warden in 1894, two rooms for the use of the deputy warden, the warden's office and library, and necessary rooms for the guards, said rooms to be in the main building.

"Either party reserves the right to cancel and annul said contract at any time, upon giving thirty (30) days' notice. The party of the first part guaranties the preservation of strict discipline, and for that purpose and pursuant to law retain the general management and control of said penitentiary, penitentiary grounds and convicts, and the right to employ officers and guards and to fix the salaries of all not now fixed by law. The state further reserves the right to say who shall be boarded at the expense of the state, and to fix the price to be paid for board if charge is made for the same.

"Signed, sealed, and delivered this 3d day of September, A. D. 1895.

A. D. BEEMER, *Lessee.*

"H. C. RUSSELL,

"*Com. P. L. & B.,*

"J. A. PIPER,

"*Sec'y B. of P. L. & B.,*

"J. S. BARTLEY,

"*State Treasurer,*

"A. S. CHURCHILL,

"*Att'y General,*

"*Board of Public Lands and Buildings.*

"Signed in presence of

"RECEA BIGLER.

"BRAD. P. COOK.

"It is understood that the money to be turned over by me as herein stated includes all money coming into my hands as lessee from contractors or the forty (40) cents per capita received from the state less the amount herein stated.

"A. D. BEEMER."

The relator's right to maintain this action is challenged by respondents, and defended upon two grounds, viz., (1) that such power is expressly conferred by statute; (2) that the object of the action is the enforcement of a public duty, in which the relator has, by virtue of his office as warden, a direct interest, and as such is entitled to prosecute the action in behalf of the state. The first contention is based upon the terms of the act of 1870 (General Statutes, p. 1031, ch. 76), under which the penitentiary was created. That act, in addition to the appropriation of funds for the erection and maintenance of the penitentiary, provides for the appointment by the governor of a warden who is declared to be the principal keeper of the prison, who is required to remain in constant attendance thereat, except when engaged in the performance of some other duty of his office, and to "exercise general supervision over and give necessary directions to the keepers and guards, examine whether they have been vigilant in the discharge of their respective duties, examine daily into the health of the prisoners and take charge of the real and personal estate belonging to or connected with the penitentiary." (General Statutes, p. 1038, ch. 76, sec. 31.) It is by section 32 of said act provided that all transactions and dealings of the prison should be conducted in the name of the warden, "who shall be capable in law of suing and being sued in all courts and places in all matters concerning the said prison by his name of office," etc. (General Statutes, p. 1038, ch. 76, sec. 32.)

The section last mentioned, it is claimed, conflicts with the provisions of section 19, article 5, of the constitution of 1875, and the act of February 13, 1877, "Establishing a board of public lands and buildings of the state of Nebraska, and defining their duties." (Session Laws, 1877, p. 188.) The constitutional provision mentioned reads as follows: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall

form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes, and shall perform such duties and be subject to such rules and regulations as may be prescribed by law." Section 1 of the act of 1877 provides that the officers above enumerated shall hereafter be known in law as "the board of public lands and buildings," and "shall have general supervision and control of all the public lands, lots and grounds, and all institutions, buildings, and all the grounds thereto, now owned or that may hereafter be acquired by the state, including the saline lands, * * * the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds," etc. (Session Laws, 1877, p. 189, sec. 1.) Section 3 provides that said board "shall have general custody and charge of all buildings and institutions and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same," etc. Section 4 provides that said board "shall have power, under the restrictions of this act, to direct the general management of all the said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions and shall * * * audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary." The evident purpose of these provisions is to invest the board of public lands and buildings with the general control and management of the institutions to which they apply, accompanied by the responsibility which is a necessary incident of the power thus conferred. They are, too, in obvious and irreconcilable conflict with the provision of the prior act for the prosecution of actions relating to the management of the penitentiary in the name of the warden.

But independent of the statute we are satisfied that the relator has such a direct interest in the subject of the controversy as entitles him to prosecute this action in the name of the state. That it is the duty of the board of purchase and supplies to provide suitable food and clothing for the convicts committed to relator's charge is a proposition not controverted by respondents. Nor can we conceive of a more appropriate means of enforcing that duty in case of default than by a proceeding on the relation of the party charged with the safe keeping as well as the health and comfort of the convicts. That view, it seems, harmonizes with the spirit of the Code as well as the former utterances of this court. (*State v. Stearns*, 11 Neb., 104; *State v. Peacock*, 15 Neb., 442; *State v. Matley*, 17 Neb., 564; *State v. Farney*, 36 Neb., 537.)

The reliance of the respondents is, as already appears, the undertaking of Beemer, the alleged lessee, to maintain the prisoners. The relator, on the other hand, while conceding the duty of the board of public lands and buildings to let to contractors, on the best attainable terms, the labor of the convicts, denies the authority of said board to lease the penitentiary, the grounds thereto belonging, or the property of the state therein.

Since it is important to ascertain the source and limit of the power conferred upon the board with respect to the subject in hand, we will briefly notice the several contentions of the respondents, although not exactly in the order presented.

It is in the first place asserted that authority for said contract is found in section 17 of the act of February 13, 1877, heretofore referred to, creating the board of public lands and buildings; but in that view we cannot concur. It is sufficient, without quoting the section named, that it provides for the leasing, after advertising as therein provided, of the penitentiary and grounds, and the convict labor, for a period not exceeding ten years. The power

thus conferred is not a continuing one, but was, on the contrary, exhausted with a single user. Such is the obvious and necessary construction of the language therein employed.

It is next claimed that said contract is authorized by section 5 of the act of 1895, entitled "An act to annul a contract between the state of Nebraska and W. H. Dorgan, alleged assignee of C. W. Mosher, for leasing the penitentiary, penitentiary grounds, and convict labor of the state of Nebraska, * * * and to repeal all acts and parts of acts in conflict with the provisions of this act." (Session Laws, 1895, p. 237, ch. 66.) It is by section 5 thereof provided, "That the board of public lands and buildings shall have power and are hereby directed to manage the state penitentiary, and the said board is hereby authorized and empowered to lease the labor of convicts to responsible persons, when in their judgment the best interests of the state would be subserved thereby; *Provided*, No contract made shall extend beyond the last day of the session of the next session of the legislature." The section quoted is, it is claimed, inimical to the provision of section 11, article 3, of the constitution, viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Turning again to the title of said act we find the words "for leasing the penitentiary, penitentiary grounds, and convict labor," separated from the remaining portions thereof by commas, indicating that it was intended as an independent provision; but an examination of the whole title, together with the lengthy preamble accompanying it, leads to the conclusion that the words last quoted are descriptive merely of the contract between the state and Dorgan, as assignee of Mosher, and not embracing a distinct and separate subject of legislation. The punctuation of statutes, presumably the work of the engrosser or publisher, is of little value in their interpretation and is frequently altogether disregarded by the courts. (Sedgwick,

Construction of Statutory & Constitutional Law, p. 223; *Hammock v. Loan & Trust Co.*, 105 U. S., 77; *Gyger's Estate*, 65 Pa. St., 311; *Doe v. Martin*, 4 T. R. [Eng.], 65.) The preamble, on the contrary, while not a part of the act, will always be consulted in case of doubt or ambiguity, in order to determine the legislative intention, and has for that purpose been held entitled to greater consideration than the title itself. (Bishop, Statutory Crimes, sec. 48; *Jackson v. Gilchrist*, 15 Johns. [N. Y.], 89; *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S., 174.) The preamble in this instance is in the usual form, reciting the history of the contract between Mosher and the state, the assignment thereof by the former to Dorgan, and concluding as follows: "And whereas it is desirable that said contract should be annulled and set aside before the same expires by limitation; therefore, be it enacted, etc." (Session Laws, 1895, p. 237, ch. 66.) It contains no reference to a further letting of the penitentiary or the convict labor. We think, therefore, that the title quoted must be held to contemplate merely the abrogation of the Dorgan contract, and not including the provision relied upon. (*State v. Hurds*, 19 Neb., 317; *Trumble v. Trumble*, 37 Neb., 340, and authorities cited.) Respondents also cite section 19, article 5, of the constitution above quoted, and the act creating the board of public lands and buildings in justification of their actions in the premises. The constitution, as we have seen, provides that said board shall have the general supervision and control over all the buildings, grounds, and lands of the state, the state prison, asylums, etc., and shall perform such duties and be subject to such rules and regulations as may be prescribed by law. And by the statute mentioned said board is invested with general custody of all buildings and institutions, including the penitentiary, with power to direct the general management thereof. The authority of the board by virtue of these provisions to lease the convict labor, with the machinery and property described in the agreement

with Beemer, cannot be doubted. But if the language in question was doubtful or ambiguous we would, from motives of humanity alone, hesitate long before adopting a construction which would result in the enforced idleness of the helpless convicts of the state.

It is next objected that the contract is void for the reason that it contemplates the turning over to Beemer of the entire control of the penitentiary, and is in brief a usurpation of the powers conferred by law upon the warden. The first inquiry suggested by that contention is, what are the powers of the warden, and what is his relation to the board of public lands and buildings? His authority, it must be remembered, so far as it relates to the government of the penitentiary, is defined by sections 15 and 31 of the act of 1870, which provide (1) that he shall be the principal keeper of the prison; (2) that he shall exercise general supervision over the keepers and guards, examine daily into the health of the prisoners, and take charge of the real and personal estate belonging to or connected with the prison. (General Statutes, 1873, pp. 1036, 1038, ch. 76.) But it was, as we have seen, provided by said act that the penitentiary should be erected and continued under the direction and control of a board of inspectors therein provided for. The obvious effect of the constitutional provision creating the board of public lands and buildings, and subsequent legislation thereunder, was to abolish the board of inspectors and invest the former with all the powers and functions of the latter with respect to the control and management of the penitentiary. The warden, therefore, continues to be, as originally designed, simply the keeper of the penitentiary, subject to the management and control of the board of public lands and buildings. We must not be understood as intimating that a lessee or contractor can, even with the assent of the state board, usurp any of the powers of the warden, although it is clear that he may, and doubtless should, be accorded such privileges consistent

with the rules prescribed for the discipline of the prison and the health and safety of the convicts as may be necessary to carry into execution his agreement with the state. The objection to the contract on the ground that it is an invasion of power conferred by law upon the relator as warden of the penitentiary is accordingly without merit.

Again, it is contended that the agreement under consideration is a complete abdication by the board of its constitutional functions, being a surrender to Beemer both of the management of the penitentiary and the funds appropriated for its maintenance. A more critical examination of the agreement under consideration satisfies us that while it is therein denominated a lease, such appellation is a misnomer. Said agreement is in our judgment susceptible of but one construction, viz., the appointment by the board of public lands and buildings of Beemer in behalf of the state for a fixed compensation, to lease the convict labor and to disburse the money appropriated for the maintenance of the penitentiary. That such is its true interpretation is apparent from the undertaking therein to pay Beemer, but the cost of feeding and clothing the prisoners, not exceeding forty cents each per day, and the undertaking of the alleged contractor to pay over to the chairman of the board all moneys received by him, the proceeds of the convict labor, less the sum of \$3,000, to be retained as compensation for himself and book-keeper. The board of public lands and buildings is composed of the executive officers of the state, who, in addition to their ordinary duties, are members of various other boards, each claiming a considerable portion of their time and attention. For them to personally direct the management in detail of the dozen different state institutions is, as we well know, impossible, hence they must, from the necessities of the case, transact much of the business pertaining to such institutions through agents of their own creation. But while the statutes regulating their duties should be liberally con-

strued in their favor, we are not at liberty to disregard one provision of the law simply in order to render the execution of others more effective. There being no conditions imposed upon the power of the board with respect to leasing of the convict labor, it may be done through the medium of an agent appointed for that purpose. Nor do we doubt the power of the board of public lands and buildings to provide by contract for the feeding and clothing of the convicts as one of the conditions for the leasing of their labor, and such an agreement with a responsible lessee, who is ready and willing to fulfill the conditions of his obligation, would be a sufficient justification in a proceeding of this character. But Beemer's undertaking being merely to maintain the convicts with funds to be advanced by the state, and to let their labor to third persons, presents no case for the application of the rule stated, or justification of the refusal of the respondents to furnish the needed supplies in accordance with the positive requirements of the act defining their duties as members of the board of purchase and supplies, provided of course the relator is in a position to allege the invalidity of said contract in this proceeding, a question which will be hereafter considered. Another inherent vice of said contract is the provision therein for the payment by Beemer to the chairman of the board of public lands and buildings of all money realized from the leasing of the prison labor. Section 2, article 4, chapter 83, Compiled Statutes, reads as follows: "It shall be the duty of the state treasurer: First—To receive and keep all moneys of the state not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the state treasury according to law, and not otherwise. Third—To keep a just, true, and comprehensive account of all moneys received and disbursed," etc. The officers comprising the board of public lands and buildings are required to give bond conditioned for the faithful discharge

of their official duties, but upon none of them does the law impose the responsibility of receiving and disbursing public funds. That board, we have held, is required to audit all claims for money disbursed for the support of the public institutions of the state. (*In re Board of Public Lands & Buildings*, 37 Neb., 425.) But the act by which it was created provides for the payment of accounts when examined and allowed by it on warrants drawn by the auditor upon the state treasurer against the proper fund or appropriation. It is argued that money thus paid over would not remain in the custody of the chairman of the board of public lands and buildings, but would be used to defray the current expenses of the prison, thereby saving to the state so much of the fund appropriated for that purpose; but it nevertheless imposes upon the officer named a liability not within the contemplation of the constitution or the statute defining his duties, and for which he would not be answerable upon his official bond. The power of the legislature to impose upon sureties of public officers new and additional burdens, is a question not now before us. But it is clear, both from principle and authority, that an action would not lie upon the bond of the officer named, to-wit, the commissioners of public lands and buildings, for money received by him pursuant to the contract here involved. Such an obligation on his part is beyond and foreign to the liability assumed by his sureties. (*Manufacturers Nat. Bank of Newark v. Dickerson*, 41 N. J. Law, 448; *People v. Pennock*, 60 N. Y., 421; *White Sewing Machine Co. v. Mullins*, 41 Mich., 339; *City of Lafayette v. James*, 92 Ind., 240; *Murfree*, Official Bonds, sec. 650; 2 *Brandt*, Suretyship & Guaranty, secs. 528 and 529, and authorities cited.)

It remains to be determined whether the relator shall in this proceeding be permitted to assert the invalidity of the contract upon which the respondents rest their defense. That question we were from the first impression strongly

inclined to resolve in the negative in view of the allegation that Beemer is now ready and willing to provide for the support of the prisoners; but further reflection has led to a different conclusion, for which our reasons will be briefly stated. This proceeding is not for the enforcement of a mere private right of the relator, but of a duty which the respondents owe to the state, while their defense rests upon the executory agreement of a third party, by which the latter undertakes to pay over money thereby received by him in behalf of the state, not to the treasurer, who alone is authorized to receive and disburse it, but to an officer whose action in that regard is wholly unauthorized and for which he would not, as already shown, be answerable on his official bond. It is elementary law that reciprocal promises as the basis of a valid agreement are equally obligatory upon the parties, so that each may have an action thereon. Otherwise such an agreement is *nudum pactum*. (Pollock, Contracts, p. 176*; Addison, Contracts, sec. 18.) It is not enough that Beemer may at this time express a willingness to account for money received by him under said contract to the commissioner of public lands and buildings, since his obligation to the state could be discharged only by means of payment in full of such funds to the officer authorized by law to receive them. The result of this reasoning is that the contract relied upon is void for want of mutuality and is not a sufficient justification of the action of the respondents, as members of the board of purchase and supplies, in refusing to provide for the maintenance of the penitentiary in the manner prescribed by law. The peremptory writ will accordingly issue as prayed.

WRIT ALLOWED.

CARL KORTH V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6679.

1. **Affidavits: BILL OF EXCEPTIONS: REVIEW.** Affidavits presented as evidence on a hearing in proceedings in a case in the district court will not be examined in this court unless made a part of the record by being embodied in a bill of exceptions.
2. **Criminal Law: FAILURE TO TRY ACCUSED: DISCHARGE: REVIEW.** When an application for discharge is made by a party charged with the commission of a crime for the reasons stated in section 391, Criminal Code, that three or more terms of court have elapsed since the one at which the information was filed against him, without his being brought to trial, and the delay has not happened on his application, or been occasioned by want of time to try it, the last two stated facts must appear affirmatively in the record by a showing made, if not otherwise. In an examination by this court to determine the propriety of the action of the district court in overruling such application they will not be presumed, but the presumption that the court proceeded regularly and without error will prevail.
3. **Appointment of Prosecuting Attorney: INFORMATION.** The provisions of section 21, chapter 7, Compiled Statutes, as follows: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six of this act" (Compiled Statutes, sec. 20, ch. 7).—*held*, applicable to the prosecution of offenses by information, established by the act of 1885 (Criminal Code, sec. 579), and to warrant or authorize the trial court to appoint an attorney to perform the duties required of the county attorney in any particular case being prosecuted under the law in regard to prosecutions for offenses by information whenever the conditions exist as stated in section 21, chapter 7, herein quoted, and that the enactment allowing such appointment is not in conflict with the provisions of section 10 of the bill of rights, in the portion wherein it refers to the legislature providing by law for holding persons to answer for criminal offenses on information of a public prosecutor.

4. **Criminal Law: PLEA IN ABATEMENT: WAIVER.** In a criminal case "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue" (see Criminal Code, sec. 444), and if a plea to the general issue has been entered and has not, on leave obtained, been withdrawn, a plea in abatement need not be entertained.
5. **Preliminary Examination: TRANSCRIPT.** Where a transcript of the proceedings at the preliminary examination, and the information upon which such examination was had, were lost or mislaid from the files of the district court, an order for the substitution of another transcript of such record and copy of the information was proper and not erroneous.
6. —: **WAIVER.** The record of the proceedings in the examining court disclosed that a complaint was filed which contained a charge of the crime for which plaintiff in error was tried in the district court, and that he was arraigned thereupon and waived examination. *Held*, Sufficient to show fulfillment of the requirements of section 585 of the Criminal Code in regard to preliminary examination.
7. **Information: SEPARATE FELONIES: ELECTION AS TO COUNTS.**
A number of separate and distinct felonies, all of which may be tried in the same manner, which are of the same general character, require for their proof evidence of the same kind and the punishment of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial for all of such counts at the same time. The question of whether the state will be required to elect between the several counts, if a motion is made by defendant that it be so required, will rest in the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion in overruling the motion, it will not be available as error.
8. **Embezzlement: INFORMATION: ELECTION AS TO COUNTS.** In the case at bar the defendant was charged with embezzlement of the funds of a county while he was its treasurer, in an information containing several counts charging several and distinct embezzlements. He made a motion that the state be required to elect upon which of the several counts of the information it would prosecute him. The trial court withheld its ruling upon this motion until the close of the introduction of the state's testimony in chief, at which time the motion was sustained and

the state required to elect under which count of the complaint it would further proceed. *Held*, So far as the record discloses, there was no abuse of discretion in the action of the trial court.

9. **Instructions.** It is not error to refuse to give an instruction when the main purpose sought to be effected by giving the instruction is clearly and fully embraced in and accomplished by other instructions read to the jury, and it appears that no prejudice could have resulted to the rights of the complaining party by reason of such refusal.

10. **Embezzlement: STATUTES.** The act of the legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks" (Session Laws, 1891, p. 347, ch. 50), did not repeal so much of section 124 of the Criminal Code as is in relation to loaning county funds, and constitutes such loaning by an officer entrusted with their care and disbursement an embezzlement.

ERROR to the district court for Antelope county. Tried below before KINKAID, J.

The opinion contains a statement of the case.

H. C. Brome, Douglas Cones, and Barnes & Tyler, for plaintiff in error:

The information was not made or filed by an officer authorized by law to do so. (*Richards v. State*, 22 Neb., 145; *White v. State*, 28 Neb., 341.)

The court erred in overruling the application of plaintiff in error to be discharged for want of prosecution. (*In re McMicken*, 18 Pac. Rep. [Kan.], 473; *People v. Morino*, 24 Pac. Rep. [Cal.], 892; *Ex parte Two Calf*, 11 Neb., 221.)

The court erred in overruling the plea in abatement, and in striking the same from the record. (Maxwell, Criminal Procedure, pp. 524, 525.)

The amount of proof required to establish the offense of embezzlement is similar in kind and quantity to that required to establish any other offense of the same grade. (16 Am. & Eng. Ency. Law, 504.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state:

The order overruling the application of plaintiff in error to be discharged was without error. (*State v. Cox*, 65 Mo., 29; *State v. Huting*, 21 Mo., 464.)

There was no error in the ruling on the motion to require the prosecuting attorney to elect upon which count of the information he would proceed. (1 Bishop, Criminal Procedure, sec. 461; *Bailey v. State*, 4 O. St., 442.)

HARRISON, J.

On December 15, 1891, an information was filed in the district court of Pierce county, charging the plaintiff in error with the crime of embezzlement of public money, the property of such county, during the time he was treasurer thereof. On the 27th day of April, 1893, the application of plaintiff in error for a change of venue was granted, and the case was sent to Antelope county for trial December 23, 1893; as a result of a trial, a verdict of guilty was rendered and entered, and, after motions for new trial and in arrest of judgment were heard and overruled, plaintiff in error was sentenced to a term of three years' imprisonment in the penitentiary. He has presented the cause to this court by petition in error.

A bill of exceptions was filed, which was attacked on the part of the state by a motion to quash, which was sustained; as a consequence of which action, we will be confined in our examination of the points raised for adjudication by the assignments of error to those which can be discussed and determined without reference to the bill of exceptions.

One assignment of error refers to alleged misconduct of the court during the trial. The facts on which this assignment depends for its force were made a part of the record by affidavits in which they were set out. There were also counter-affidavits in relation to the same matter filed for

the state. Affidavits of the character of these, in order that the subjects embraced in them may be available in the presentation of questions in this court, must be preserved in a bill of exceptions; and if it was done in this case, the bill of exceptions has been quashed, consequently the facts with relation to this objection are not properly before this court for examination. It follows that the assignment of error is unsupported and must be overruled.

During the pendency of the cause, and before trial, the plaintiff in error made application by motion to be discharged on the ground that four terms of court, succeeding the one during which the information under which he was prosecuted was filed, had passed without a trial being accorded him, and that the delay or failure to bring the cause to trial was not occasioned by any application or act of his or by lack of time. Affidavits were filed in support of the motion, to show that the trial of the case had not been delayed on application of the plaintiff in error, or for want of time, and on the part of the state mainly directed to an attempt to show the opposite to be true as to both facts; but the affidavits are not presented to this court by a bill of exceptions, and we cannot examine or consider them. The record before us does not disclose that the delay in the trial of the cause was caused in any manner by the plaintiff in error, or for lack of time at any term of the court to try it, nor does the contrary appear. For the purpose of the motion doubtless it devolved upon the plaintiff in error, if not disclosed by the record, to show that there had been no postponement of the trial of the cause on his application, or that the delay was not occasioned by the want of time to try it during the third term of court held subsequent to a term at which the information was filed. In the absence of the appearance of these facts in the record or a showing in regard to them, we think the presumption must prevail that the court proceeded regularly and without error, and properly held and placed the plaintiff in error upon trial

Korth v. State.

at the time it did; or it will not be presumed that the trial court, in the face of the existence or a showing of the existence of the facts which entitled the plaintiff in error to his discharge under the provisions of section 391 of the Criminal Code, ignored his constitutional right to a speedy trial (see Constitution, art 1, sec. 11), and improperly held and tried him for the crime with which he was charged.

Another contention is that the information filed in the case was not made or filed by any officer or person authorized by law. The information was made and filed by W. W. Quivey, who was not the county attorney of Pierce county at the time, and whose authority, if he possessed any, was derived from an order of the court in this particular case, which was as follows: "Now on this 14th day of December, 1891, the same being a judicial day of the regular December, 1891, term of said court, this cause came on for hearing, and the county attorney failing to appear and prosecute this case, and it appearing to the court that said county attorney is disqualified from prosecuting on behalf of the state of Nebraska, by reason of his having been retained as counsel for the defendant, Carl Korth, prior to his election and qualification as county attorney aforesaid; and it further appearing that said county attorney has no deputy qualified to appear for him in this cause: It is therefore ordered by the court that W. W. Quivey is hereby appointed by said court to act as county attorney in this case, and that John S. Robinson is hereby duly appointed by the court to assist the said W. W. Quivey as county attorney in the prosecution of this cause." Pursuant to this order W. W. Quivey acted in all particulars as county attorney in this case. It is argued that, under the provisions of our constitution (art. 1, sec. 10), that "No person shall be held to answer for a criminal offense * * * unless on a presentment or indictment of a grand jury; *Provided*, That the legislature may by law provide for holding persons to answer for criminal offenses on infor-

mation of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system;" and the act of 1885, establishing prosecution of crimes by information, in one section (Criminal Code, sec. 579,) of which it is stated, "All informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant,"—the county attorney is indicated as the person—and the only one—who can make and file an information in a prosecution by such proceeding without the intervention and finding of a grand jury; that the several district judges or courts of the state possess no right to and cannot appoint any one to file information in the place and stead of the county attorney. The legislature which passed the act authorizing prosecutions by information also passed an act in relation to county attorneys and their duties, etc. In one section (Compiled Statutes, sec. 21, ch. 7) it was provided: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six (6) of this act [Compiled Statutes, sec. 20, ch. 7]." This, doubtless, gave the trial court power to make the appointment, and the person designated in its order possessed the authority to act in this particular case in all matters or questions arising therein which would properly have fallen within the province of the county attorney to examine and determine had he been present and not disqualified to act, nor do we think, in thus holding, we do any violence to the proper enforcement of the provisions of the constitution and the law of 1885 invoked by the plaintiff in error, when given their true and practical significance. It is urged that the power to thus appoint an attorney to prosecute a cause

against a person accused of crime is liable to be abused, and some one assigned the duty who is incompetent, or who will not fairly conduct the case, but may, in the interest of private parties who desire an exceedingly vigorous prosecution to be made, allow the criminal case to become the means of satisfying personal spite or the gratification of malicious purpose, and the party charged with crime be persecuted, rather than prosecuted as the law contemplates. This contention involves the assumption that the person who has been so fortunate as to be elevated by a majority of the votes of the electors of the judicial district to the high and honorable position of district judge will lend himself, or be hoodwinked into seeming to countenance the scheme depicted in this argument, and the member of the bar appointed will be disreputable and ready to disregard his oath and act in an unprofessional manner. With this view we cannot agree. It must rather be presumed that both judge and attorney will perform their respective duties fairly, impartially, and honorably. It is possible that, in exceptional cases, what is claimed in the argument may happen, but if so, it may always be remedied in the same or a higher court.

A plea in abatement was filed in behalf of plaintiff in error and on motion of the state was stricken from the files, or practically overruled. This action of the court is assigned as error. The plea was founded upon the same matters as presented in the motion to discharge the plaintiff and which we have hereinbefore discussed. Whether it was proper practice for the court to strike the plea from the record, or whether the subjects set forth in the plea were such as may properly be presented by the plea in abatement, we need not stop to consider, for, on December 17, 1891, plaintiff in error had been arraigned and pleaded generally, and on the date the plea in abatement was filed the plea to the general issue was still of record and not withdrawn. This being true, all defects which might have

been excepted to by plea in abatement were waived (see sec. 444 of the Criminal Code); and if it was error, which we do not now decide, for the court to strike the plea from the files, it could not prejudice the rights of plaintiff in error, as, at the time, the plea could not have been of any avail.

Another objection is that, at the time the plaintiff in error was placed on trial, the record did not show that he had ever been accorded a preliminary examination for the crime with which he was charged in the trial court. This objection was made in the district court at the inception of the introduction of testimony and was overruled by the court. This is assigned for error. The prosecution was instituted in the county court of Pierce county and, after it reached the district court, an information was filed. Afterward, during the pendency of the cause in Pierce county, an order was made in which it was recited that the transcript of the record of the hearing before the county judge, and some of the accompanying papers, and particularly the information filed in the examining court, had been lost, and that a new transcript and copy of the information be substituted. A change of venue was applied for and granted and the case was transferred to Antelope county, and the order of substitution was not fulfilled until after the removal of the cause to Antelope county, and the commencement of the trial; but the transcript then filed disclosed that the plaintiff in error waived an examination in the county court. This being true, there was no prejudice to his rights in proceeding with the trial at a time when the transcript of the hearing in the examining court was not in the record by reason of being lost or mislaid, or in allowing another transcript and copy of such information to be substituted.

Another alleged error is that the court erred in refusing to require the state to elect on which count of the information the plaintiff in error should be tried. There were five counts in the information, as to the fourth of which a *nolle*

Korth v. State.

prosequi was entered before the cause came to trial. A motion was filed at or about the time of trial to require the state to elect upon which count of the information it would proceed. Upon this the court withheld its ruling until such time as the evidence for the state should all be introduced, and when the trial had progressed to the stage indicated, sustained the motion, and an election was accordingly made at that time by the state. It is urged that the court erred in not sustaining it at the time when made. After the fourth count of the complaint was ignored, there still remained four counts in which separate and distinct felonies were charged, but each was a charge of embezzlement of public money, the money of the county of which the plaintiff in error was treasurer. The offenses were all of the same general character, required for their proof the same quality of testimony, the same manner of trial and mode of punishment, and it was proper to try the plaintiff in error upon the several counts at the same time. Whether there should be an election as to the particular count was a question within the discretion of the trial court. This, in the case at bar, was exercised by allowing the prosecution to introduce its testimony and then requiring it to elect, and we cannot discover from the record that in this there was any abuse of discretion. As to the main proposition, see 1 Bishop, Criminal Procedure [3d ed.], secs. 424, 450, 451; Wharton, Criminal Pleading & Practice, sec. 285 *et seq.*; *Commonwealth v. Jacobs*, 25 N. E. Rep. [Mass.], 463; *Pointer v. United States*, 14 Sup. Ct. Rep., 410; *State v. Hodges*, 26 Pac. Rep. [Kan.], 676; 4 Am. & Eng. Ency. of Law, 754-756; *Roberts v. People*, 17 Pac. Rep. [Colo.], 637.

It is claimed the court erred in refusing to give instruction numbered 2, requested by plaintiff in error. This instruction was as follows: "You are instructed that in law the words '*prima facie*' mean 'at the first blush,' 'on the first appearance of.' Such evidence, in a criminal case, is

not sufficient to warrant a conviction. The rule obtains in all criminal prosecutions that the evidence must be sufficient to convince the jury of the defendant's guilt, and of every element of the transaction going to establish his guilt, beyond all reasonable doubt." Instruction numbered 1, given at the request of plaintiff in error, reads: "You are instructed that the statutes of this state provide that any failure or refusal to pay over public money, or any part thereof, by any officer or other person charged with the collection, receipt, transfer, disbursement, or safe-keeping of the public money, or any part thereof, whether belonging to the state, or to any county, or precinct, or school district, or organized city or incorporated village in this state, or any other public money whatsoever, * * * shall be taken and held as *prima facie* evidence of embezzlement. Nevertheless you are instructed that the state must prove to you beyond all reasonable doubt that the defendant converted the public moneys of Pierce county to his own use, with intent to defraud the said county out of the same; and if you have any reasonable doubt of such fact, you will give the defendant the benefit of such doubt and find him not guilty." The argument is, that inasmuch as the court thought fit to give instruction numbered 1, then, to convey to the jury a proper understanding of its terms, and in particular the words "*prima facie* evidence," No. 2 should have been given. It will be noticed that in the concluding portion of No. 1 the jury is informed that notwithstanding all that may have been stated in the preceding portion of the instruction the proof to be sufficient to convict must be beyond a reasonable doubt, and in an instruction numbered 3, asked by plaintiff in error and given, this feature of the requirement in regard to the proof was stated in strong terms, and in instruction numbered 3, given by the court on its own motion, the above rule was clearly and positively announced, and it also appears in other portions of the instructions. In view of all this, we are satisfied that no

Korth v. State.

prejudice could have resulted to the rights of plaintiff in error from the refusal of the court to give the instruction indicated in the assignment of error.

The giving of each of the instructions numbered 1 and 2 of the charge to the jury given by the court on its own motion is assigned as error. The main objection raised is claimed to be applicable to both and we will so examine it. No. 1 of these instructions was a copy of the section of the Criminal Code defining the crime of embezzlement of public money, under which this prosecution was instituted, and No. 2 quoted the first count of the information and stated that it contained a charge against the plaintiff in error of a violation of the section set forth in instruction numbered 1. It is alleged that the act of the legislature of 1891, in relation to depositing the county funds in banks, repealed at least so much of the section defining the crime of embezzlement as refers to the loaning of such funds, and that these instructions were erroneous in not noticing the act of 1891, and its claimed effect upon the laws of embezzlement, and in not informing the jury that it should not consider any evidence in relation to loaning the county funds, as bearing upon the issue which was being tried. To the proposition that the act of 1891 repealed the portion of the law of embezzlement in regard to the loaning of funds of a county we do not agree. The act of 1891 was entitled "An act to provide for the depositing of state and county funds in banks," (Session Laws, 1891, p. 347, ch. 50,) and in its text it is confined to providing for the deposit of such funds, for safe-keeping, in banks, under certain requirements as to bonds being furnished for the security of such funds, and other details, and in each and every detail it appears that it is for the county and its benefit that such deposits are to be made, the treasurer acting in each and every instance for and in behalf of the county, and as prescribed by law and not of his own volition. If he refuse to perform any of the statutory requirements, he is liable to pun-

Korth v. State.

ishment therefor, and if he deposit the money of the county, under the direction of the law, in a bank which has given bond he is not liable for any money so deposited. It is true there is a section of the act referred to which defines as a crime the making of any profit whatever, directly or indirectly, by the county treasurer out of any money belonging to the county, in his charge, by loaning it. It is the fact that a profit is derived from it that subjects him to punishment and not the fact of the loaning. The deposit of the funds which the treasurer is called upon to make by the law in question is, in effect, a deposit by the county. The treasurer has only to place it where directed and draw it when needed for county purposes. In the law defining embezzlement the loaning by the treasurer, either with or without interest, is evidence of a conversion of the funds to his own use and is to be punished as an embezzlement. Clearly, evidence of a deposit of the funds such as is contemplated by the act of 1891 would not be competent and could not be received in a prosecution for embezzlement of county funds by the treasurer, as tending to show a loan; nor does the fact that an attempt has been therein made to provide a punishment of the treasurer for making a profit out of the public money by loaning it, in any manner or degree conflict with or abridge the right or power of the state to punish the act of loaning the funds by the treasurer as an embezzlement. We are clearly of the opinion that the act of 1891 referred to did not work a repeal of the portion of the law in relation to the loaning of county funds by officers entrusted with their care and charged with their disbursement, and which constitutes such loaning a conversion and embezzlement of the funds loaned. The judgment of the district court is

AFFIRMED.

M. J. KAUFMANN V. WILLIAM J. COOPER ET AL.

FILED JANUARY 9, 1896. No. 5899.

1. **Contracts to Erect and Repair State Buildings: BONDS.**

It is within the province of the proper officers of the state in entering into an agreement on behalf of the state, with a contractor, for the erection or repair of its buildings, or additions thereto, to require the insertion of a condition in the contract and the bond executed to secure its faithful performance, whereby the contractor agrees to pay for all labor performed or material furnished him in completing such contract, and the right to exact such a condition exists independent of statutory provision conferring it, nor does the absence of statutory provision authorizing it render such a condition in a contract illegal or void.

2. ——— : **CONSIDERATION.** A promise made by one person to another for the benefit of a third person may be enforced by such third person, notwithstanding the consideration did not move directly from him.

3. ——— : ———. The granting of a contract by the state for the construction of a building for it, or additions or repairs to buildings, is a sufficient consideration to sustain a promise on the part of the contractor to pay for all labor and material supplied him in the performance of the agreement.

4. ——— : **BONDS: LIABILITY OF SURETIES.** A contract was awarded by the state for furnishing material and performing labor in and upon the industrial home at Milford, by one provision of which the contractor was to be paid eighty-five per cent of monthly estimates made by a superintendent of construction, as the work progressed, and the balance on the full completion and acceptance of the work. *Held*, That the condition in the bond given by the contractor, by which the payment of all accounts for labor and material furnished him for such purpose was secured, was not rendered nugatory, so far as the liabilities of the sureties were concerned to laborers or furnishers of material, by reason of payment to the contractor made in excess of an estimate of the superintendent of construction.

5. ——— : ——— : ———. The firm of Symonds & Blake was awarded a contract by the state for the performance of certain labor in and about the industrial home at Milford, and gave a bond, to secure, among other things, the full payment of all

Kaufmann v. Cooper.

claims of laborers, mechanics, or furnishers of material. Plaintiff contracted with such firm to furnish material for use in the performance of its agreement with the state. Soon after the firm of Symonds & Blake contracted with the state, and further contracted with the plaintiff to furnish it material, Symonds withdrew from the firm, and S. C. Blake, the other member of the firm, or S. C. Blake & Co., composed of S. C. Blake and one Godfrey J. Kaufmann, who became a partner of Blake's when Symonds retired from the firm, or it was dissolved, succeeded to the rights of Symonds & Blake in the contract with the state, and the plaintiff furnished material in accordance with the terms and under the agreement made with Symonds & Blake. *Held*, That the sureties in the bond were not released from their obligation to pay claims for labor or material, by the dissolution or change in the firm of Symonds & Blake, and an action on the bond could be maintained against them thereon by plaintiff for any balance due on account of material furnished S. C. Blake, or S. C. Blake & Co., for use in the execution of the contract with the state.

6. **Review.** If the evidence is sufficient to sustain the findings of a jury they will not be disturbed.
7. **Briefs: ASSIGNMENTS OF ERROR.** Assignments of error which are not noticed in the brief of plaintiff in error will be treated as waived.
8. **Assignments of Error.** Alleged errors in regard either to giving or refusing instructions should be separately assigned, and if assigned in a group will, as to either one, be examined no further than is necessary to ascertain that the action as to any one of the instructions of each of the groups was proper.
9. **Instructions: REVIEW.** A verdict will not be set aside for possible errors in giving instructions where it is clear that the error, if any, could not have prejudiced the rights of the complaining party.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Guy R. C. Read and *W. A. Williams*, for plaintiff in error.

William Leese and *John M. Stewart*, contra.

HARRISON, J.

The petition in this action stated that on the 29th day of June, 1889, Symonds & Blake were awarded and entered into a contract with the state to furnish materials for and perform certain labor upon and about the industrial home at Milford, and executed and delivered to the state a bond for the faithful and full performance of the contract, J. W. Foster and M. J. Kaufmann signing such bond as sureties; that the bond contained the following conditions: "The condition of the above obligation is such that the above bounden Symonds & Blake have been awarded the contract to furnish all the materials and labor and skill necessary to the purpose, and to erect, construct, and fully complete, in a good and workmanlike manner, for the use of the industrial home at Milford, Nebraska, the steam heating, gas fitting, plumbing, ventilation, sewerage, windmill, well, and three cisterns, all to be in strict conformity to the plans, specifications, and detailed drawings now on file in the office of the commissioner of public lands and buildings at Lincoln, Nebraska, and to pay off, in full, all claims that may become due for laborers' and mechanics' wages or for materials furnished in or about said contract. Now if the above bounden Symonds & Blake shall well and truly keep and perform each and every covenant, promise, and agreement contained in said contract at the several times, and in the manner therein stated, and fully pay all claims due for laborers; mechanics, or furnishers of materials, then this obligation to be void; otherwise to be and remain in full force and virtue in law." Copies of the contract, the bond, and an itemized statement of the account for material which the party in whose favor the action was instituted claimed to have furnished, were attached to the pleading. To the action there was but one appearance on the part of the defendants, that of Kaufmann, one of the sureties on the bond. In his answer he denied that the

material was furnished to Symonds & Blake or by virtue of the contract with them, or that the fact that the bond existed was any inducement to the plaintiff in the action to extend the credit to the parties to whom it was given, and alleged affirmatively that if the plaintiff furnished any material it was to S. C. Blake & Co., and upon the credit of such firm, and without reference to the contract with Symonds & Blake; that the provision of the bond hereinbefore quoted was exacted wrongfully and contrary to legal right, and hence was void; that the firm of Symonds & Blake assigned its contract to S. C. Blake & Co., which was known to plaintiff, and such assignment was acquiesced in or ratified by the state; that the contract contained a provision that Symonds & Blake were to receive for furnishing the material and performance of labor as therein stated the sum of \$3,039 "at the times and in the manner following: Eighty-five per cent of the monthly estimates made by the superintendent of construction, as the work progresses; and the balance to be paid when the said contract has been fully completed and tested and accepted by the board of public lands and buildings;" and that a payment was made to plaintiff without any estimate being made by the superintendent of construction, and other and further payments were made so that in the aggregate they amounted to more than eighty-five per cent of the estimates made during the progress of the work, of all of which these plaintiffs had knowledge and approved; that of and to the doing of these things, all and singular, the answering defendant was not informed, had no knowledge, gave no consent, and his discharge as surety was thereby effected. The reply was a general denial. There was a trial and a verdict and judgment for plaintiff. The defendant Kaufmann, of the sureties on the bond, presents the case here for review.

We will first notice the portion of the contention on behalf of the surety Kaufmann, in which it is asserted that he

was discharged from any obligations he had assumed as such surety (1) by the payment of \$500 to the plaintiff without any estimate of the superintendent of construction as a basis or authority for such payment, and (2) by the payment of more than eighty-five per cent of an estimate made of the amount due plaintiff by the superintendent of construction. It may be said in regard to the second of these points that the aggregate sum of eighty-five per cent of an estimate made by the superintendent during progress of the work, of the amount due plaintiff, and the alleged prior payment of \$500, the basis of the first point mentioned, would make the payments just \$500 more than the amount of the estimate; or, in other words, it is claimed that \$500 were paid to plaintiff prior to any estimate made, and that, combining it with the payment made on a subsequent estimate, the whole amount of the payments was in excess of eighty-five per cent of such estimate. The promise in the bond to pay the laborers and parties furnishing material was for their benefit, and in an action thereupon by either it was enforceable, notwithstanding the act or acts of the state in making the alleged payments, which, in an action by the state against the contractor principal in the bond for a default in any of its conditions, might have precluded a recovery and have constituted a defense for the sureties on the bond, and released them from liability thereon (which we do not decide), and the sureties were not released from their obligations to either laborers or materialmen whose valid claims were unpaid. (*Doll v. Crume*, 41 Neb., 655.) In the case cited the doctrine was applied to a state of facts which disclosed a payment on an estimate, in excess of the per cent which, according to the terms of the contract, was to be paid upon estimates, but is equally forcible where, as in the case at bar, a payment has been made unauthorized by an estimate, the reason which supports the rule being in all respects as pertinent and cogent in reference to the latter phase of the case as to the former

one, or the one as to which it was declared in the case to which we have called attention.

It is urged that the bond, in the particular condition which was made the basis of this action, was illegally required and exacted, was without warrant or authority of law; that inasmuch as the statutes governing the subject involved directed that a bond be taken, and prescribed a number of particulars to be covered by conditions inserted therein, and did not include the subject of payment to laborers or furnishers of material, the provision in the bond which covered this particular, not coming within the direct requirements of the statutory provisions, was illegal, unauthorized, and void, and hence not enforceable. A similar question has been presented to, considered, and determined by this court, and it has been decided that it was within the province of the proper officers of the state, upon whom it devolved to let such contract, to exact a bond containing a condition in relation to the payment of laborers' wages and the accounts of parties who had furnished material, and it was held that such a condition was valid and any liability arising thereunder could be enforced. (*Sample v. Hale*, 34 Neb., 220; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649.)

It is also urged that the plaintiff was not a party to the bond, and that no action could accrue or be based thereon in its behalf. A precisely similar question to this one has been heretofore discussed in and by this court, and it was then held that the promise set forth in the condition of the bond under consideration was for the benefit and an action arose thereon in favor of the laborer to whom wages remained due or to the furnisher of material whose account or any portion thereof was unpaid. (*Doll v. Crume*, 41 Neb., 655; *Lyman v. City of Lincoln*, 38 Neb., 794; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Sample v. Hale*, 34 Neb., 220.)

It is also urged that by the dissolution of the firm of

Kaufmann v. Cooper.

Symonds & Blake, and the transfer of the contract to furnish the material and perform the labor to S. C. Blake & Co., or by the new firm assuming its performance, the sureties on the bond were not bound to pay the account for material furnished by plaintiff to the latter firm for use in the performance of the contract with the state under the contract it had made to do so with Symonds & Blake. It is disclosed by the evidence that soon after the firm of Symonds & Blake had entered into the contract with the state, and had further contracted with the plaintiff for the furnishing by it of the material, Symonds withdrew from the firm and S. C. Blake, or S. C. Blake & Co., which consisted of S. C. Blake and one Godfrey J. Kaufmann, who became a partner with Blake at the time Symonds retired from the firm of Symonds & Blake and it was dissolved, succeeded to all the rights of the old firm in the contract with the state, and the plaintiff furnished to S. C. Blake & Co. the material for use in the fulfillment of the contract with the state which it had contracted to furnish to Symonds & Blake. Under these circumstances the sureties on the bond were not released and an action on the bond could be maintained against them by plaintiff for the unpaid amount due it on account of material furnished to Blake, or S. C. Blake & Co., for use in the performance of the contract with the state. (17 Am. & Eng. Ency. of Law, p. 1150; *Freeman v. Berkey*, 48 N. W. Rep. [Minn.], 194; *Abbott v. Morrisette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *French v. Griffin*, 10 S. E. Rep. [N. Car.], 166.)

It is urged that the testimony does not show that the material stated in the account, upon which this suit was based, was used in the construction of the "industrial home." The evidence was sufficient to sustain the finding of the jury in respect to this branch of the case, and in accordance with a well established rule of this court, it will not be disturbed. Errors were assigned of the action of the

trial court in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived.

It was assigned that the court erred in giving instructions 1 and 2 of the instructions given on its own motion. Of these instructions No. 2 was clearly pertinent and proper, and this being ascertained, no further examination of these instructions need be made, as the alleged errors were not separately assigned.

Complaint was also made that the court erred in refusing to give instructions 1, 2, 3, 4, 5, and 6, asked by the plaintiff in error. These instructions were framed and submitted in support of the views of counsel for plaintiff in error in relation to the questions involved in the case, and, according to our determination of such questions, were, several of them, clearly erroneous and improper, one of which was that numbered 2, and as they were grouped in the assignment which referred to them, having concluded that one was incorrect and properly refused, it disposes of the entire assignment.

The action of the court in giving instructions numbered 1 and 2, requested by the plaintiff in that court, was assigned as error. These instructions do not conflict materially, if at all, with the views herein expressed in regard to the proper disposition to be made of the issues in the case, under the facts as developed in the evidence. There is nothing in them which could prejudice the rights of the complaining party, and their giving was not error. The judgment of the district court is

AFFIRMED.

E. F. MOREARTY V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7864.

1. **Forgery:** INFORMATION. It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Roush v. State*, 34 Neb., 325, reaffirmed and followed.
2. ———: ———. An order to deliver to bearer a specific article of personal property is within the definition of section 145 of our Criminal Code in relation to forgery, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind."
3. ———: ———. The order or request upon which the charge in this case was founded, to let bearer have a designated article of personal property, *held* to be the subject of forgery, though not addressed to any person by name; and where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility, by its use, to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms.
4. **Instructions.** The giving of an instruction which submits to the jury the existence or non-existence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

The facts are stated in the opinion.

John O. Yeiser, Martin Langdon, and Mahoney & Smyth,
for plaintiff in error:

The instrument set out in the information, being of doubtful or uncertain validity, cannot be the subject of forgery except by the allegation of extrinsic matter. (1

Morearty v. State.

Bishop, Criminal Law [5th ed.], sec. 748; *Roode v. State*, 5 Neb., 174; *People v. Harrison*, 8 Barb. [N. Y.], 560; *Barnum v. State*, 15 O., 717; *People v. Galloway*, 17 Wend. [N. Y.], 540; *People v. Tomlinson*, 35 Cal., 503; *Rembert v. State*, 53 Ala., 467; *Dixon v. State*, 81 Ala., 61; *State v. Cook*, 52 Ind., 574; *State v. Wheeler*, 19 Minn., 98; *Shannon v. State*, 109 Ind., 407.)

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state:

In reply to the objections to the sufficiency of the information, reference was made to the following cases: *Roush v. State*, 34 Neb., 326; *State v. Hart*, 67 Ia., 142; *State v. Bauman*, 52 Ia., 68; *Peete v. State*, 2 Lea [Tenn.], 513; *Dixon v. State*, 26 S. W. Rep. [Tex.], 500; *State v. Gullette*, 26 S. W. Rep. [Mo.], 354; *People v. Krummer*, 4 Park. Crim. Rep. [N. Y.], 217; *Noakes v. People*, 25 N. Y., 380; *Rudicel v. State*, 13 N. E. Rep. [Ind.], 114; *Powers v. State*, 87 Ind., 97; *Arnold v. Cost*, 3 G. & J. [Md.], 231; *Rex v. Ward*, 2 Ld. Ray. [Eng.], 1461; *Crawford v. State*, 19 S. W. Rep. [Tex.], 766; *State v. Wheeler*, 25 Pac. Rep. [Ore.], 394; *People v. Brown*, 72 N. Y., 571; *Commonwealth v. Costello*, 120 Mass., 370; *Commonwealth v. Brown*, 18 N. E. Rep. [Mass.], 587; *Stewart v. State*, 16 N. E. Rep. [Ind.], 186; *Hendricks v. State*, 9 S. W. Rep. [Tex.], 555; *Brewer v. State*, 22 S. W. Rep. [Tex.], 41; *Billings v. State*, 107 Ind., 57.

HARRISON, J.

As a result of a trial during the May, 1895, term of the district court of Douglas county the plaintiff in error was convicted of the crime of forgery and was sentenced to be imprisoned for a term of one year in the penitentiary and to pay a fine of \$100. To obtain a review of the proceedings therein the plaintiff in error brings the cause to this court on petition in error.

The information filed contained two counts, the first of which charged as follows:

"That on the 8th day of March, in the year of our Lord 1894, Edward F. Morearty, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, then and there unlawfully and feloniously did forge and counterfeit a certain order and request for the delivery of goods, in words and figures following, to-wit:

"MARCH 8, 1894.

"Please let bearer have the trunk I put in your house at 5:30 this P. M. The bill is all paid and everything O. K.

FRANK MCKINZIE, *Constable.*'

with intent to defraud."

The second count charged that the plaintiff uttered and published the order as true and genuine, with intent to defraud.

It is first argued that the information filed is insufficient and did not charge a crime; that there are two defects apparent upon its face, one of which is a failure to allege an intent to defraud "any person or persons, body politic or corporate, or any military body organized under the laws of this state," and the other that the instrument set out in the information by copy as forged, was one on which no action could be predicated without an allegation of extraneous matter, and no such facts were pleaded. The first of these objections to the information is untenable. It is sufficient, in an information for forgery, to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. (*Roush v. State*, 34 Neb., 325; Criminal Code, sec. 417.)

It is claimed, as we have before stated, that the information was defective for the reasons that the instrument alleged to have been forged, which was set out in the information in full as the basis of the charge of forgery, was so imperfect or incomplete in its terms that it was not on its

face apparently good and valid and that it was necessary, to a good information, that there should have been averments of matters extrinsic to the instrument, explanatory of or extending its signification and that no such matters were pleaded. In our statutes (see Criminal Code, sec. 145) there is stated, in a long and quite comprehensive list, a number of instruments which may be the subject of forgeries, and among them, "any order or any warrant or request for the payment of money, or the delivery of goods and chattels of any kind." The instrument declared upon in the information purported to be an order for the delivery of a trunk, and its false making, if sufficiently perfect in its terms, would be within the provisions of our Code relating to forgery. The only further question is, was it apparently sufficient within itself to effect the purpose for which it was made? The instrument in this case was one which upon its face called for the delivery to the bearer of a specific article, "the trunk I put in your house at 5:30 this P. M." "The bill is all paid and everything is O. K." The signature attached was "Frank McKinzie, Constable." While it is true it was not addressed to any person, yet it is apparent that it could be but for the one party with whom the trunk was left or in whose house it was placed at 5:30 P. M. of the day the instrument was dated, and it seems quite clear that the order, if genuine, would have been explicit and clear enough for presentment to such party and demand for the delivery of the trunk and to warrant him in honoring it. This being true, its making was forgery, and it was not necessary to plead any facts extrinsic to it in the information. If used, it was of a character to deprive some one of property rights. There was a possibility of some person being defrauded by its false making, and this was apparent from its face, and no averments of other and extrinsic matters were necessary in the complaint. Its meaning was sufficiently apparent or could be gathered from the face of the instrument alone, and it was not essential to a

full charge that there should be statements of evidential matters in the pleading. (*Dixon v. State*, 26 S. W. Rep. [Tex.], 500; *State v. Gullette*, 26 S. W. Rep. [Mo.], 354; *Noakes v. People*, 25 N. Y., 380; *Hendricks v. State*, 9 S. W. Rep. [Tex.], 555; *People v. Krummer*, 4 Park. Cr. Rep. [N. Y.], 217.) "But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence, so as to make out more fully the charge." (1 Wharton, Criminal Law, sec. 740.)

It was assigned that the court erred in giving instruction numbered 5 to the jury. This instruction reads as follows: "You are further instructed that the intent of a person is necessarily an operation of the mind and is not ordinarily susceptible of direct proof, but may be determined by words spoken or acts done, or by both words and acts. Every human being of sufficient age to understand the nature and consequences of his acts is presumed to intend the natural and probable consequences of his acts; and if you find from the evidence beyond a reasonable doubt that the trunk in question was in the possession of one W. H. McKinzie as constable, that he had deposited said trunk for safe-keeping temporarily with one Robinson, and that defendant, for the purpose of obtaining possession of said trunk from said Robinson, did unlawfully and fraudulently make, forge, and counterfeit the said instrument set out in the first count of the information, and did present said instrument to said Robiusion, and did obtain thereby said trunk, you would have a right to infer, in the absence of proof to the contrary, that the defendant did unlawfully and falsely make and counterfeit said instrument with intent to defraud; and, if the other facts necessary to a conviction and these facts have been established by the evidence beyond a reasonable doubt, the defendant would be guilty upon the first count of the information, and you should convict him on said first count of the information; and if the facts necessary

to a conviction, as hereinbefore explained to you, upon the second count of the information, have been established by the evidence beyond a reasonable doubt, and you further find from the evidence, beyond a reasonable doubt, that defendant uttered or passed said instrument described in said second count of the information for the purpose of obtaining the trunk in question from said Robinson, you would be authorized in concluding that he uttered and published said instrument with the intent to defraud some person or persons,"—and the objection urged against it is that it submitted to the jury, in both its first and second paragraphs, whether the trunk was in possession of W. H. McKinzie as constable; that this was error, for the reason that there was no evidence introduced of the fact of such possession. After a careful examination of all the testimony given on the trial, we feel forced to the conclusion that this position is a correct one. The evidence does disclose that one W. H. McKinzie (or Washington McKinzie) was a constable in Douglas county and that he took possession of the trunk in question; that he took it from Birdie Mann, on Ninth street, in the city of Omaha; that he had a writ of replevin at the time he took the trunk; that he left the trunk at the house or store of one Robinson, where Morearty found it when he sought or obtained it by means of the instrument set out in the information; but it nowhere appears, nor do we think it can be fairly inferred from what is shown, that McKinzie assumed possession of the trunk as constable, or by virtue of the writ of replevin, or that he held such possession as such officer or under such writ of replevin or any other writ or process, or that either his taking or holding possession of the trunk was referable in any manner or to any degree to his duties or position officially, or by virtue of any replevin or other writ and its service as an officer. The use of the alleged forged order, judging from the intent and possibility of its defrauding any one, which, in the manner of its pleading, must be derived

Rauschkolb v. State.

from the instrument itself, could but result injuriously, if at all, to prejudice the rights of McKinzie to the possession of the trunk as constable; and there being no right of possession, as such officer, shown in him, no evidence to support a finding of such fact, if made, it was error to submit the question to the jury, and prejudicial, as the intent of the crime charged in the information was to violate the rights of the officer. (*Williams v. State*, 46 Neb., 704.)

There are some other assignments of error argued in the briefs, but we do not deem it necessary to enter into a discussion of them at the present time.

It follows from the views expressed herein that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

NORVAL, J. I concur in the result, expressing no opinion upon the sufficiency of the information.

BERNHARDT RAUSCHKOLB ET AL. V. STATE OF
NEBRASKA.

FILED JANUARY 9, 1896. No. 7602.

1. **Indictment and Information: INDORSEMENT OF NAMES OF WITNESSES: TIME.** In the discretion of the trial court, the names of additional witnesses may be indorsed by the county attorney on the information after the filing thereof and before the trial.
2. **—: —: POSTPONEMENT OF TRIAL.** In such case, however, where a request is made to postpone the trial for twenty-four hours to enable the defendant to meet the testimony expected to be given by the person whose name is so indorsed, it is an abuse of discretion to deny such request, if such witness is examined on the trial and gives material testimony for the state in making out its case in chief.

ERROR to the district court for Nemaha county. Tried below before BUSH, J.

See opinion for statement of the case.

John S. Stull and *C. P. Edwards*, for plaintiffs in error:

The court erred in refusing plaintiffs in error a reasonable time in which to prepare for trial after the name of the witness Levi Shores had been indorsed on the information. (*Johnson v. Dinsmore*, 11 Neb., 394; *Newman v. State*, 22 Neb., 355; *Gandy v. State*, 27 Neb., 707; *People v. Evans*, 72 Mich., 367; *Elliott v. State*, 34 Neb., 48.)

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *A. J. Burnham*, County Attorney, for the state, cited: *Gandy v. State*, 24 Neb., 723.

NORVAL, J.

This is a prosecution brought under section 20, chapter 50, Compiled Statutes of this state, for keeping and having in possession for sale, without a license, certain intoxicating liquors. The prisoners were found guilty, and the judgment rendered against them upon the verdict is before us for review.

The record discloses that the case was continued from term to term until the 20th day of March, 1894, when, upon a showing made by the county attorney, permission was given, over the objection of defendants, to indorse upon the information the name of Levi Shores. An exception to the ruling was taken, and the defendants thereupon, by reason of said indorsement, asked that they be given twenty-four hours in which to prepare for trial. This the court refused, but arraigned the defendants at once, and forthwith impaneled a jury to try the case, and on the same day a

Rauschkolb v. State.

verdict of guilty was returned. The permitting the county attorney to indorse the name of the witness on the information and refusing defendants' request to postpone the trial are assigned for error.

Section 579 of the Criminal Code provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same, and at such time, before the trial of any case, as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him. In the case under consideration it appears from the affidavit of the county attorney that he was not such officer when the information was filed, and that he had no means of knowing that Levi Shores could give material testimony until the time the application was made to indorse his name. The statute gives authority to indorse upon an information the names of additional witnesses after the filing thereof and before the trial. It is discretionary with the trial court whether such permission shall be given or refused, and its ruling in that regard is no ground for disturbing the verdict, where no abuse of discretion is made to appear. Upon the showing made, we think the discretion of the court was properly exercised in authorizing the name of the witness to be indorsed on the information.

The denial of the defendants' request for a postponement of the trial is fraught with more serious consequences. It was the duty of the trial court, in allowing the indorsement of the name of an additional witness on an information, to protect the rights of the accused; and where a reasonable request is made to delay the hearing in order that the defendant may meet the testimony expected to be given by the person whose name is so indorsed, the court should give the defendant a reasonable time to prepare his defense. It is, doubtless, true, as contended by the attorney general, that an application of the character indicated is addressed

to the sound discretion of the court, and unless prejudice is shown to have resulted from a denial thereof, the ruling will not be disturbed by this court. The bill of exceptions shows that Levi Shores was a most important witness for the state in making out its case in chief. His testimony was to the effect that he bought intoxicating liquors of the defendants at the place where the liquors in question were kept. The purpose of this testimony was to establish the intent of the defendants in keeping the liquors,—one of the essential ingredients of the crime charged. A reasonable postponement of the trial should have been allowed the defendants to meet this testimony, and the twenty-four hours asked by the defendants was not an unreasonable time. There was an abuse of discretion in refusing this request. (*Parks v. State*, 20 Neb., 515; *Stevens v. State*, 19 Neb., 647.)

The conclusion reached in *Gandy v. State*, 24 Neb., 723, cited by the state, does not conflict with the ruling herein. There additional names were indorsed upon the information immediately preceding the trial, and a continuance was thereupon requested by the defendant, which was denied. The testimony of those whose names were thus indorsed was immaterial, and the continuance was asked over the term. In these important respects the case differs from the one at bar.

Other errors are assigned, but the conclusion already reached makes their consideration unnecessary. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Lewis v. Barker.

ED. E. LEWIS V. MARTIN BARKER ET AL.

FILED JANUARY 9, 1896. No. 5685.

Final Order: REVIEW. An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal.

ERROR from the district court of Burt county. Tried below before CLARKSON, J.

H. Wade Gillis, for plaintiff in error.

NORVAL, J.

This suit was instituted in the district court of Burt county by the plaintiff in error against Martin Barker, Frank Dellone, Fred Dellone, and John McCrary. Barker was summoned in Burt county and the other defendants in Douglas county. Subsequently, on motion of the two Dellones and McCrary, the summons was by the court quashed as to them, on the ground that it was issued without the authority of law, and to reverse this order the plaintiff prosecutes a petition in error to this court.

The decision of which complaint is here made is not reviewable, since it is not final in such a sense as to constitute a final judgment. An order sustaining a motion to quash a summons is not reviewable in the appellate court before a final judgment dismissing the cause has been rendered in the court below. This was distinctly held in *Brown v. Rice*, 30 Neb., 236; *Persinger v. Tinkle*, 34 Neb., 5; *Standard Distilling Co. v. Freyhan*, 34 Neb., 434. (See *Smith v. Johnson*, 37 Neb., 675; *Seven Valleys Bank v. Smith*, 43 Neb., 237; *Edgar v. Keller*, 43 Neb., 263, and authorities therein cited.) Since the record fails to show that a final judgment of dismissal has been rendered in the cause in the court below, the petition in error is

DISMISSED.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE
ET AL.

FILED JANUARY 9, 1896. No. 5820.

Usury: SET-OFF. Money paid as usurious interest to a national bank cannot be set off in a suit brought by the bank more than two years after such payment to recover the principal sum.

ERROR from the district court of Saline county. Tried below before GASLIN, J.

Abbott & Abbott, for plaintiff in error.

F. I. Foss, *contra*.

NORVAL, J.

On the 4th day of January, 1889, the plaintiff in error executed a chattel mortgage to the First National Bank of Crete, upon certain specific personal property, to secure the payment of his promissory note of \$3,000, given on that date to the bank, and payable on April 22, 1889, with ten per cent interest from date. Subsequent to the maturity of the note the defendant in error seized and took into its possession the property described in the mortgage. Thereupon John Lanham brought this action of replevin against the bank to recover the mortgaged chattels. A trial was had to the court, with findings and judgment for the defendant. Plaintiff prosecutes error.

The defendant claims the property under the chattel mortgage already mentioned. The evidence shows that Lanham borrowed of the defendant, at a usurious rate of interest, the sum of \$6,000, and gave his note therefor, which note was renewed from time to time by the plaintiff giving new notes, the last renewal being the note secured by said mortgage. It is also disclosed that plaintiff has

paid at various dates usurious interest on said original and renewal notes, and that the sums so paid, together with the payments made generally, equal the original amount borrowed. Most of the usurious payments were made more than two years prior to the bringing of this suit; and the sums so paid within that period, nor double the amount thereof, when added to all payments generally on the indebtedness, are insufficient to cancel the mortgage. If the plaintiff is entitled to be credited with all usurious-interest payments, whenever made, as he contends, then there was nothing due on the mortgage when this suit was instituted, and the judgment should have been against the bank. The question is presented by the record whether the plaintiff can avail himself of the provisions of section 5, chapter 44, of the Compiled Statutes of this state, which provides, *inter alia*: "If in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." The identical question was decided in *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381. It was there held that the foregoing statute did not apply to national banks; that usurious interest paid a national bank on a note cannot be set off in an action upon such note; and that the federal statute alone determines the penalties that shall be visited upon such banking institutions for exacting and receiving illegal interest; that is, if illegal interest has been contracted for and not paid, the bank forfeits all interest; but if illegal interest has been paid to a national bank, the borrower may recover double the amount thereof, provided his action is commenced within two years from the time the usurious transaction occurred; further, that the borrower may not set off in an action on the note either the amount of usurious interest paid thereon, or double the

sum so paid, more than two years before the action was instituted. In addition to the authorities cited in the opinion in that case sustaining the doctrine, see *First Nat. Bank of Peterborough v. Childs*, 133 Mass., 248; *Ellis v. First Nat. Bank of Olney*, 11 Brad. [Ill.], 275; *First Nat. Bank of Clarion v. Gruber*, 8 W. N. C. [Pa.], 119, 91 Pa. St., 377; *Nat. Bank of Fayette County v. Dushane*, 9 W. N. C. [Pa.], 472, 96 Pa. St., 340; *Lebanon Nat. Bank v. Karmany*, 98 Pa. St., 65; *Nat. Bank of Auburn v. Lewis*, 81 N. Y., 15; *Oldham v. First Nat. Bank of Wilmington*, 85 N. Car., 240.

It is argued that the removal acts of congress have given the states control over national banks, and, therefore, such banks are subject to the remedies provided by the laws of the respective states wherein they are situated. We held adversely to this contention in *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381, *supra*, and that the removal acts did not make such banking institution liable to the penalties imposed by a state for receiving usurious interest, but the purpose of congress in enacting those laws was to prevent the removal of suits to which a national bank is a party from a state to a federal court. With the conclusion then reached we are content.

It was likewise urged that by the proviso clause of section 4 of the act of congress, approved July 12, 1892, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," each national bank continuing its existence after the expiration of its original charter is subject to all laws governing state banks where it exists and does business. The proviso reads as follows: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized

Lanham v. First Nat. Bank of Crete.

under any law of the United States which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun." (United States Statutes at Large, vol. 22, p. 163, sec. 4.) We cannot adopt the construction placed upon said provision by counsel for plaintiff. It is patent that it was not the intention of congress thereby to repeal section 5198 of the Revised Statutes of the United States prescribing the penalties imposed upon national banks for taking, reserving, receiving, or charging illegal interest. The purpose of the national legislature was not to subject national banks to the penalty imposed by the usury laws of the state, but to confer the same jurisdiction upon state courts for actions brought by or against national banks, with certain specified exceptions, as obtains for suits by or against banks not organized under any law of congress. So far as the forum is concerned, state and national banks were placed upon the same footing by the provision quoted above. It is true that the supreme court of the United States has not, to the knowledge of the writer, in express terms, construed the proviso clause of section 4 of the act of 1882, since most of the adjudications of that court, affirming the doctrine that money paid a national bank as usurious interest cannot be applied by way of payment or set off in an action to recover the principal sum, were rendered prior to the date of said act. The decision in *Stephens v. Monongahela Nat. Bank*, 111 U. S., 197, wherein the same principle was held and applied, after a review of the prior cases in that court upon the subject, was announced March 31, 1884, or nearly two years after the act of 1882 became operative. The fair and reasonable implication from this is that the act did not have the effect to modify or make inapplicable the previous decisions of the court upon the question under consideration.

We have examined the case of the *State v. First Nat. Bank of Clark*, 51 N. W. Rep. [S. Dak.], 587, cited by

plaintiff. The conclusion reached in the case at bar is not in conflict with the opinion therein. In South Dakota there is a statute which makes the receiving of a greater rate of interest than that fixed by law a misdemeanor. Under this statute a criminal prosecution was instituted against the First National Bank of Clark for taking usury, and it was found guilty, and the judgment was affirmed by the supreme court of the state. While it was held that a national bank is amenable to the criminal law of that state prescribing a fine for taking usury, it was distinctly stated that the laws of congress alone determine the results which should follow the taking by national banks of unlawful interest, its effect upon the contract, and the remedies of the parties; and further, that such remedies are purely civil. The court in discussing the question, in the opinion, say: "It may be disciplinary and a punishment, but it is a civil punishment, as distinguished from a criminal punishment. Exemplary damages, recovered in a civil action, are in a sense penal, but they never prevent the criminal law from operating upon the same act in the name of the state. One is civil, the other criminal. One is based upon the violation of private rights, the other upon the violation of the right of the state to have its laws respected." The Dakota case is clearly distinguishable from the one before us. The dissimilarity is so obvious that it need not be pointed out.

We entertain no doubt that the rights and remedies of the parties herein are to be determined by the provisions of section 5198 of the Revised Statutes of the United States. The decision of the court below being in harmony with the conclusion we have reached, the judgment is

AFFIRMED.

Lanham v. First Nat. Bank of Crete. State v. McFadden.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE
ET AL.

FILED JANUARY 9, 1896. No. 6614.

Usury: SET-OFF. *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, followed.

ERROR from the district court of Lancaster county.
Tried below before TUTTLE, J.

Webster, Rose & Fisher and *Abbott & Abbott*, for
plaintiff in error.

F. I. Foss, contra.

NORVAL, J.

The facts in this case are in all material respects like those in *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, and the judgment of the district court herein is affirmed on that authority.

AFFIRMED.

STATE OF NEBRASKA, EX REL. D. T. WELTY, v. H. W.
McFADDEN ET AL.

FILED JANUARY 9, 1896. No. 8117.

1. **Elections: CANVASSERS OF RETURNS.** The duties of canvassers of election returns are ordinarily ministerial, and as a general rule they are not clothed with either discretionary or quasi-judicial powers.
2. ———: ———. Where it appears that an unauthorized alteration has been made in the return of the vote after the return has been delivered to the county clerk, the canvassers should disregard the alteration, and make the count according to the original and true return.

3. ———: RETURNS. The returns of an election consist of the whole election proceedings which the statute requires to be entered upon the poll books and tally list, viz., the certificate of the election officers, the list of those voting, and the tally list of the number of votes cast for the different persons, and from these the abstract of the vote is to be made.
4. ———: ———: DUTY OF CANVASSERS. In case of a discrepancy between the certificate and the tally list as regards the number of votes cast for a particular person, the canvassers must determine which is correct, after comparing them with the list of voters returned, and declare the result accordingly.
5. **Mandamus:** CANVASSERS OF ELECTION RETURNS. Where a board of canvassers has made a canvass, declared the result, and adjourned, *mandamus* will lie to compel it to reconvene and make a correct canvass of all the returns before it, if upon the first canvass the board has failed or refused to fully perform its duty.

ORIGINAL application for *mandamus* to compel the respondents to reconvene as a board of canvassers and recanvass the votes cast in Furnas county, at the last general election, for the office of judge of the fourteenth judicial district of Nebraska. *Writ allowed.*

No briefs filed.

W. R. Starr and *A. J. Rittenhouse*, for relator.

J. T. McClure, contra.

NORVAL, J.

This is an application for a writ of *mandamus*, brought originally in this court by D. T. Welty against the respondents, to compel them to reconvene as a board of canvassers and recanvass the votes cast in Furnas county, at the last general election, for the office of judge of the fourteenth judicial district. To the petition, answers were filed by the respondents, and thereupon, by the agreement of parties, John F. Cordeal, Esq., was appointed referee to take the testimony and report the same to the court. The cause

was heard upon the pleadings and proof, and as prompt action was required to protect the rights of the parties, a peremptory *mandamus* was issued as prayed at the last term of this court, without waiting for the preparation of an opinion expressing our views upon the questions presented by the record.

It appears that at the election held on the 5th day of November, 1895, the relator was the candidate of the people's independent party for the office of judge of the fourteenth judicial district; that George W. Norris was the candidate of the republican party for said office, and W. W. Barngrover was the candidate of the democrat party. Subsequent to said election, the respondents, as the county canvassing board, canvassed the votes cast at said election in said Furnas county for judge of the district court, and entered an abstract of the votes by precincts upon the book provided by the county clerk for that purpose, which abstract shows the votes cast in said county for said office were counted, canvassed, and declared as follows: For Barngrover, 108 votes; for Norris, 1,376 votes; for Welty, 881 votes. A copy of said abstract was transmitted to the secretary of state. It also appears that in Union precinct, in said county, the respondents found, and so certified, that there were cast for said office 10 votes for Barngrover; 46 votes for Norris, and for the relator 33 votes.

The first contention of the relator is that the returns made by the election board of Union precinct have been falsely and fraudulently tampered with and changed since they were lodged with, and received by, the county clerk and while in his custody, by increasing the number of votes cast for Norris from 40 to 46, and that the respondents should have credited to Norris 40 votes from said precinct instead of 46 votes. It is disclosed by the poll-book of Union precinct, conveyed to the county clerk, that the names of 86 persons, and no more, were returned by the election board as having voted in said precinct at said elec-

State v. McFadden.

tion. The certificate of the judges and clerks of election of said precinct accompanying the returns states the number of votes cast for judge of the district court as follows: "Annie R. Woodby, one; W. W. Barngrover, ten; G. W. Norris, forty; D. T. Welty, thirty-three." The tally sheet returned with the poll-book from Union precinct now shows, *inter alia*, the following:

NAME OF OFFICE.	NAMES OF PERSONS VOTED FOR.	TALLY LIST.
Judge District Court	W. W. Barngrover	10
	G. W. Norris	46
	D. T. Welty	33

It will be observed that there is a discrepancy on the face of the returns between the certificate of the votes cast for Norris for the office of district judge, and the tally sheet, or list, of the votes received by him. The certificate of the judges and clerks of the election show that Norris received 40 votes, while the tally list of the poll-books, counting the tally marks thereon, credits him with receiving 41 votes, though as now appearing the tallies are footed 46. The evidence discloses that, when the returns were made and delivered to the county clerk, the tallies marked opposite the name of Norris were carried out as either 40 or 41, and that the "0," or the "1," has been since fraudulently changed, but by whom it does not appear, into the figure "6," so as to make the number read "46" votes for Norris; and the respondents, acting as canvassers, have canvassed the same as 46 votes for Norris in said Union precinct. Under the law, it was the duty of the respondents to cast up the votes received by each person according to the returns of such votes transmitted to the county clerk by the judges and clerks of the election from the several voting districts of the county. It

is the settled law of this, and other states, that the duties of canvassing boards are ordinarily ministerial, and that they possess no judicial functions. (*Hagge v. State*, 10 Neb., 51; *State v. Hill*, 10 Neb., 58; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442; *Long v. State*, 17 Neb., 61; *State v. Kavanagh*, 24 Neb., 506; *State v. Elder*, 31 Neb., 169; *Lewis v. Commissioners of Marshall County*, 16 Kan., 102; *People v. Hilliard*, 29 Ill., 413; *People v. Head*, 25 Ill., 325; *State v. Steers*, 44 Mo., 223; *Phelps v. Schroder*, 26 O. St., 549; *People v. Kilduff*, 15 Ill., 492; *McCrary, Elections*, sec. 229, and cases cited in note 2.) While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. Thus, where what purports to be two or more returns from the same election district are received by the county clerk, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return. (*McCrary, Elections*, sec. 227; *Long v. State*, 17 Neb., 61.) So, too, where there is a discrepancy between the certificate of votes cast for any person for a particular office and the tallies of the votes cast for him, the canvassers must determine from the entire returns which is correct. There may be other cases where such boards are clothed with some discretion or quasi-judicial powers, in performing their legal duties, but whether so or not, for the purposes of this case, it is unnecessary to determine. There can be no doubt, when the returns are regular in form and genuine, the canvass is purely a ministerial act, and the votes must be counted as shown by the returns of the local election boards, and that *mandamus* will lie in such case to compel them to do so. The canvassers must cast up and count the votes as returned by the officers of election, and this is true, even though the returns may have been altered either by fraud or accident after they were delivered to the custody of the county clerk. (*State v. Dalton*, 1 O. C. C. Rep., 161; *State v. Garesche*, 65 Mo., 480; *State v. Kava-*

nagh, 24 Neb., 506; *State v. Malley*, 17 Neb., 564.) In the Ohio case the poll book and tally sheet had been altered after the return had been signed, which was apparent from the face of the papers, by adding 200 tallies to certain candidates and changing the figure "7" into a "9," thereby increasing the vote on the tally sheet 200 votes. The court held that the canvassers should reject and not count such forgery or falsified figures. In *State v. Garesche, supra*, there had been an alteration of the returns after they had been sent in, and it was held, in a proceeding by *mandamus*, that it was the duty of the canvassers to disregard the alteration, and make the count according to the true return. In the case at bar the respondents should have based their canvass upon the original and genuine return from Union precinct, and rejected the forged portion thereof. Norris should not have been credited with 46 votes from said precinct, since it was only from the falsified returns that the inference could be drawn that that number of votes had been cast for him thereat.

As already indicated, there is a discrepancy, between the tallies and the certificate of the election officers accompanying the returns from Union precinct of one vote since the number of votes cast for Norris for district judge, the tallies show 41 votes, while the certificate states he received 40 votes. It is urged by the relator that the tally list constitutes no part of the returns, and that the certificate of the election officers stating the number of the votes cast for a particular person must control. To this doctrine we cannot assent. There is some diversity of judicial opinion in regard to whether the tally list is a part of the returns and should be considered by the canvassers; but the decided preponderance of the decisions, under statutes similar to ours, sustains the doctrine that the tally list may be considered by the canvassing board. The returns consist of the entire election proceedings which the statute requires to be entered upon the poll-books and tally list. In other words,

the returns are composed of the certificates of the election officers entered in the poll-book, together with the names of those voting and the tally list of the number of votes cast for the different persons. The tally sheet is as much a part of the returns as the certificate of the judges and clerks. (*State v. Hill*, 10 Neb., 62, 20 Neb., 119; *State v. Kavanagh*, 24 Neb., 510; *State v. Cavers*, 22 Ia., 343; *Simon v. Durham*, 10 Ore., 52; *People v. Ryule*, 91 Ill., 525; *Dalton v. State*, 43 O. St., 652.) It, therefore, follows that it is the duty of the canvassing board, in making the abstract of the vote of an election, to consider the entire returns, to-wit, the certificate of the election officers, the list of voters, and the tally list; and where there is a discrepancy or conflict between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct, and make an abstract of the vote accordingly. No arbitrary rule can be laid down. Upon such comparison, the canvassers may be justified in counting the votes as shown by the tally list, rather than the number stated in the certificate, and *vice versa*. The law imposes upon the canvassers the duty of canvassing the returns exactly as filed with the county clerk by the election boards, and, until the canvassers have so compiled the vote, their task is uncompleted. They have no right to adjourn without day until they have finished their work. It has been repeatedly decided that after they have made one canvass, declared the result, and adjourned, they may be compelled by *mandamus* to re-assemble and make a correct canvass of all the returns, where it appears that upon the first canvass they neglected or refused to fully perform their duty. (*State v. Dinsmore*, 5 Neb., 145; *State v. Hill*, 10 Neb., 63; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442.) A peremptory writ of *mandamus* will issue as prayed, requiring

State v. Eastman.

the respondents to reconvene and canvass all the votes returned from Furnas county.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. ALFRED BARTOW, V.
O. K. EASTMAN ET AL.

FILED JANUARY 9, 1896. NO. 8114.

1. **Elections: RETURNS: DUTY OF CANVASSERS.** The tally list required to be sent to the county clerk is a part of the election returns, and is proper to be considered by the canvassing officers, and where there is a discrepancy between the certificate of the election board and tally list as to the vote cast for any person, it is for the canvassers to determine which correctly states the vote, after making comparisons with the list of those purporting to have voted, and they should make the abstract of the vote and declare the result accordingly.

ORIGINAL application for *mandamus* to compel the respondents to reconvene as a board of canvassers and recanvass the votes cast in Dawes county, at the last general election, for the office of judge of the fifteenth judicial district of Nebraska. *Writ denied.*

No briefs filed.

J. R. Webster, D. B. Jenckes, and A. W. Crites, for relator.

J. R. Gilkeson, contra.

NORVAL, J.

This is a proceeding by *mandamus*, commenced in this court, to compel the respondents, the board of canvassers of Dawes county, to reconvene and recanvass the votes

cast at the election held in said county on November 5, 1895, for the office of judge of the fifteenth judicial district. The relator, Alfred Bartow, and W. H. Westover and others were voted for at said election for said office. The returns have been canvassed by the respondents, and it is conceded by the relator that the abstract was correctly made except as to his own vote in one of the two voting districts in Chadron precinct, in said county, from which district the canvassers credited him with 262 votes. In this district a discrepancy appears on the face of the returns between the certificate of votes cast for relator and the tally list. The certificate reads "two hundred and sixty-seven, 227" The tally list, in form "NN NN," etc., which counted shows 262 votes for Bartow. It is argued that not only does the certificate govern, but that the number written out in full should prevail over the figures. In *State v. McFadden*, 46 Neb., 668, it was held that the tally list was as much a part of the election returns as the certificate signed by the proper officers, and where a discrepancy exists between them, it is for the canvassing board to determine, after making comparisons with the list of persons purporting to have voted, which part of the returns correctly states the vote cast for a particular person and to count the vote accordingly. That decision is decisive of the case at bar. There is a discrepancy between the written number in the certificate and the figures therein of 40 votes, and the respondents corrected the returns and computed the votes according to the tally list, as they were fully justified by the entire returns in doing. The writ is denied.

WRIT DENIED.

FARMERS LOAN & TRUST COMPANY V. M. M. KILLINGER ET AL., APPELLEES, AND DAVID A. HALE, APPELLANT.

FILED JANUARY 9, 1896. No. 5772.

Judgments: ORDER VACATING: CONTINUANCE OF LIEN. A court, upon setting aside a mere money judgment, has no power to continue in existence the statutory judgment lien of the judgment set aside that it may attach to such judgment as subsequently may be rendered in the same cause.

APPEAL from the district court of Madison county.
Heard below before SULLIVAN, J.

Allen, Robinson & Reed, for appellant, cited: *Exley v. Berryhill*, 30 N. W. Rep. [Minn.], 436; *Whereatt v. Ellis*, 30 N. W. Rep. [Wis.], 520; *Nuckolls v. Irwin*, 2 Neb., 60; *Flagg v. Cooper*, 54 N. Y. Sup. Ct., 50; *Loomis v. Second German Building Association*, 37 O. St., 392; *Leonard's Appeal*, 94 Pa. St., 180; *Kittanning Ins. Co. v. Scott*, 101 Pa. St., 449; *Cope's Appeal*, 96 Pa. St., 294; *Holmes v. Bush*, 35 Hun [N. Y.], 637.

S. O. Campbell and Wigton & Whitham, contra.

RYAN, C.

This action was for the foreclosure of a mortgage made to the Farmers Loan & Trust Company by M. M. Killinger and his wife. There were made defendants Louis Stein & Co., David Hale, and L. B. Baker. A controversy not settled to the satisfaction of one party was between L. B. Baker, who had filed his claim for a mechanic's lien against the real property of Killinger on August 6, 1889, and D. A. Hale, who had recovered judgment against M. M. Killinger on May 2, 1889. One of the

journal entries introduced in evidence in this case was as follows:

"DAVID A. HALE
v.
M. M. KILLINGER. } Wm. V. Allen's journal entry.

"And now on this 29th day of July, 1889, it being a judicial day of the regular April, 1889, term of this court, this cause came on for hearing to the court on the defendant's motion to set aside the judgment heretofore entered in this case, and to be let in to defend, supported by the affidavit of the defendant. On consideration of said motion the same is granted by the court, the judgment set aside, and the defendant let in to defend, on condition that he pay all the costs of this case; to all of which the plaintiff duly excepted.

"It is further ordered that the plaintiff have forty days from this date to prepare and settle a bill of exceptions. It is further ordered that the attachment and general judgment lien obtained by the plaintiff in this case shall be preserved to him and in no manner be affected by this order."

On May 2, 1890, judgment was rendered in the above entitled cause against the defendant for the sum of \$388.45 and costs. The judgment which had been rendered just one year previously was for \$620. As has already been stated, the claim of L. B. Baker for a mechanic's lien was filed August 6, 1889. The appellant claims that this lien was subject to the lien of whatever judgment should be recovered ultimately by Mr. Hale, and that, therefore, the final judgment in the sum of \$385.45 should have been declared superior to the aforesaid mechanic's lien. The contention of the appellees, that the lien of David A. Hale's judgment dated only from May 2, 1890, was sustained by the district court, and to reverse this postponement of his lien this appeal was taken.

In argument it was urged that the order setting aside

the judgment in Mr. Hale's favor was made upon condition that the judgment lien, previously existing, should be preserved and held to attach to whatever judgment ultimately should be rendered. This construction is not borne out by the language employed, for the order with reference to the preservation of said lien was made after, and independently of, the order setting aside the judgment.

It is further insisted that the language of the final paragraph of the above journal entry brought about one result, and that was that the lien of the judgment opened was, by the court, preserved for the enforcement of whatever final judgment should be rendered. To sustain this appellant's counsel have cited several Pennsylvania cases. The practice in that state does not seem to depend upon an express provision of the statutes. We infer, however, that there is held to exist a material difference between opening a judgment and setting it aside. This inference seems justified by the following language quoted from *Steinbridge's Appeal*, 1 Penr. & W. [Pa.], 481: "A judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such, of which the order of the court has not deprived it. Here it was opened to let the party into not even a full defense; consequently it was no further disturbed than to effect that object." In 1 Troubat & Haly's Practice, section 60, a work specially designed for use in Pennsylvania, is found this language: "Our remedy, also, for irregularity or collusion in the rendition of a judgment is to overturn it; but for pretermitted matter of defense it necessarily is to open it, for it is impossible to say what may be found due. Our practice, therefore, is to try collusion by a collateral issue, but matter of defense, by an issue in the cause which gives the defendant all proper advantage of matter of original defense without loosening the plaintiff's hold on the security gained by the judgment." The Pennsylvania cases cited in the brief for appellant were where the judgment

had been opened and the defendant let in to defend. They, therefore, afford no justification of the claim that in that state a judgment may be set aside and yet that the lieu of such judgment may continue to exist.

In the case of *Flagg v. Cooper*, 54 N. Y. Sup. Ct., 50, the judgment was not vacated, but leave to defend was granted upon the express condition that the judgment already in existence should stand as security, but that no execution thereon should issue. The fact that the defendant had availed himself of this condition influenced the court somewhat in the direction of holding the defendant bound by this provision.

The case of *Loomis v. Building Association*, 37 O. St., 392, also cited by the appellant, rather tends to deny than recognize the claim that a lien may survive a judgment after it has been set aside, for in that state it had been deemed necessary to effect that result that this statutory provision quoted in the opinion should be adopted, to-wit: "In all cases where the party against whom the judgment is rendered obtains a second trial under the act to which this is amendatory and supplementary, the lien of the opposite party so obtaining such second trial, created by said judgment, shall not be by the obtaining of such second trial removed or vacated, but the real estate of said party so obtaining such second trial shall be bound in the same manner as if said second trial had not been demanded until the final determination of the case."

From this review of all the cases cited by the appellant upon this point it is very clear that an order made, as was the one which we now have under consideration, has not been shown to have had the effect claimed to have been generally recognized as resulting from such an order.

In *Loomis v. Building Association*, *supra*, it was said: "A judgment lien is a creature of the statute, and does not exist except by its authority. The correctness of this proposition will not be questioned. The provision of our stat-

ute, found in section 477 of the Code of Civil Procedure, by virtue of which appellant's judgment created a lien of any kind, is in this language: "The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered." There is found in the statutes of this state no provision which makes this lien dependent upon any other consideration than the rendition of a judgment. It would be deemed an extraordinary and unwarranted proceeding if a court, contemporaneously with the entry of a mere money judgment, should order that by virtue thereof its lien should date from some time named before the first day of the current term. If such an order could not be made at the time of the rendition of the judgment, it could scarcely be possible for the court, upon the entry of an order setting aside such judgment, to provide that if thereafter, no matter if a year subsequently, there should be another judgment, its lien, instead of arising as provided by statute, should be deemed to have been in existence from the date at which the first judgment had its origin. We are not considering what order might properly be made by a court in the exercise of its equity powers continuing a lien as between the parties to such an action.

In the case wherein judgment was rendered, M. M. Killinger was the sole defendant, the party whose lien is sought to be postponed therefore could not be bound by an order or judgment on the theory that as to him it was *res judicata*. We are of the opinion that, under the circumstances, the court had no power upon opening a mere money judgment to order that the lien thereof should remain in existence and attach to a subsequent judgment of like character whenever such judgment might be rendered. The judgment of the district court is

AFFIRMED.

Baker v. Killinger. State v. Sioux City, O'N. & W. R. Co.

L. B. BAKER V. M. M. KILLINGER ET AL., APPELLEES,
AND LOUIS STEIN & CO. ET AL., APPELLANTS.

FILED JANUARY 9, 1896. No. 5773.

Judgments: ORDER VACATING: CONTINUANCE OF LIEN.

APPEAL from the district court of Madison county.
Heard below before SULLIVAN, J.

Allen, Robinson & Reed, for appellants.

Wigton & Whitham, contra.

RYAN, C.

The questions involved in this case are the same as those involved in *Farmers Loan & Trust Co. v. Killinger*, 46 Neb., 677. It follows that the judgment in this case rendered by the district court should be, and, therefore, it is,

AFFIRMED.

STATE OF NEBRASKA; EX REL. BOARD OF TRANSPORTATION, V. SIOUX CITY, O'NEILL & WESTERN RAILROAD COMPANY, F. C. HILL, ITS RECEIVER, AND FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JANUARY 9, 1896. No. 7526.

1. **Constitutional Law: FEDERAL DECISIONS: STARE DECISIS.**
The construction placed upon provisions of the federal constitution by the supreme court of the United States must be followed by state courts in all matters to which such provisions are applicable. Following *Franklin v. Kelly*, 2 Neb., 79; *Bressler v. Wayne County*, 25 Neb., 468.

State v. Sioux City, O'N. & W. R. Co.

2. ———: STATUTES: RAILROAD COMPANIES: TRANSFER SWITCHES.

The provisions of chapter 11, Laws, 1893, which require railroad companies, as an absolute finality, and without the right of judicial investigation by due process of law, to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, is in conflict with the provisions of the fourteenth amendment of the constitution of the United States, that no state shall "deprive any person of life, liberty, or property without due process of law." Following *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S., 418, 458, and *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362.

3. ———: ———: ———: COURTS. It is not within the power of a court to make such an arrangement for the business intercourse of common carriers as in the opinion of such court they ought to make for themselves, for such function is legislative, rather than judicial. Following *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S., 667; *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587; *Express Cases*, 117 U. S., 1.

4. ———: ———: ———. The power of the legislature to require railroad lines to build and maintain transfer switches between themselves, being but an incidental consideration, is not discussed or decided in this case. The main purpose of chapter 11, Laws, 1893, being the regulation of business intercourse of connecting railroad companies, said act is held invalid, as not being susceptible of enforcement as an entirety, for the reasons given in the second and third paragraphs of this syllabus.

ERROR from the district court of Holt county. Tried below before CHAPMAN, J.

The opinion contains a statement of the case.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and W. A. Dilworth, for plaintiff in error:

In an argument against the contentions that chapter 11, Session Laws of 1893, is void for uncertainty, and that the act creates no tribunal, in case of a disagreement of the companies, to determine their respective rights, reference

State v. Sioux City, O'N. & W. R. Co.

was made to the following authorities: *Texas Express Co. v. Texas & P. R. Co.*, 6 Fed. Rep., 437; *Southern Express Co. v. Iron M. & S. R. Co.*, 10 Fed. Rep., 210; *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 Fed. Rep., 3; *State v. Republican V. R. Co.*, 17 Neb., 647.

The transfer switch is a facility for conducting the business of a railroad. The act does not, therefore, deprive the carriers of their property without due process of law. It does not deny them the equal protection of law, nor provide for taking their property without compensation. Its effect is not to impair the obligations of contracts. (*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep., 854; *Burlington, C. R. & N. R. Co. v. Dey*, 48 N. W. Rep. [Ia.], 98; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill., 135; *Louisville & N. R. Co. v. Boland*, 18 L. R. A. [Ala.], 260; *Reagan v. Mercantile Trust Co.*, 154 U. S., 418; *San Antonio & A. P. R. Co. v. State*, 79 Tex., 264; *State v. Wabash, St. L. & P. R. Co.*, 83 Mo., 144; *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep., 722; *Smith v. Chicago, M. & St. P. R. Co.*, 53 N. W. Rep. [Ia.], 128; *Vincent v. Chicago & A. R. Co.*, 49 Ill., 33; *People v. Chicago & A. R. Co.*, 55 Ill., 95; *Chicago & A. R. Co. v. Sufferin*, 129 Ill., 274; *Hoyt v. Chicago, B. & Q. R. Co.*, 93 Ill., 609; *People v. New York, L. E. & W. R. Co.*, 28 Hun [N. Y.], 549; *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y., 27; *State v. Hartford & N. H. R. Co.*, 29 Conn., 538; *Covington Stock Yards Co. v. Keith*, 139 U. S., 128; *Wight v. Missouri P. R. Co.*, 20 Mo. App., 481; *Budd v. State of New York*, 143 U. S., 517; *Brass v. State of North Dakota*, 153 U. S., 391; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140; *State v. Chicago, B. & Q. R. Co.*, 2 Am. R. & C. Rep. [Neb.], 664; *American Rapid Telegraph Co. v. Hess*, 4 Am. R. & C. Rep. [N. Y.], 199; *Maine v. Grand T. R. Co. of Canada*, 5 Am. R. & C. Rep. [U. S.], 248; *Galena & C. U. R. Co. v. Rae*, 68 Am. Dec. [Ill.], 374.)

William B. Sterling and Lloyd W. Bowers, contra:

By the act, a railroad is required to engage in the business of transporting freight beyond its own line of road, and so is forced into an occupation which it has never bound itself to enter. Such legislation is a deprivation of liberty and property without due process of law, abridges the immunities guarantied to railroads as to others, and denies them the equal protection of the laws, all in contravention of section 1 of the fourteenth amendment to the constitution of the United States. (*Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq., 178; *Ames v. Lake Superior & M. R. Co.*, 21 Minn., 255; 2 Morawetz, Private Corporations [2d ed.], secs. 1047, 1059; Hutchinson, Carriers [2d ed.], sec. 145; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep., 567; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S., 668.)

The rates fixed by the act for any transportation of freight in the course of which a transfer switch is traversed are unreasonable, and have the effect of taking property without due process of law, in disregard of both the federal and state constitutions. (*Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362; Black, Constitutional Law, pp. 318, 324, 325; *In re Jacobs*, 98 N. Y., 98; *Toledo, W. & W. R. Co. v. City of Jacksonville*, 67 Ill., 37.)

The right of railroads, under their charters from congress and the state of Nebraska, to charge reasonable rates, is a contract right, and is subject to regulation only by the legislative power of the state in the proper exercise of the police power, and for the purpose and to the extent of preventing unreasonable charges; but the act in question subjects the rates of one railroad to control by other railroads, and places the rates under arbitrary and unreasonable restrictions, thereby impairing the obligation of the contract growing out of the company's charter, and so violating article 1, section 10, of the federal constitution. (3 Am. &

State v. Sioux City, O'N. & W. R. Co.

Eng. Ency. Law, 741; Black, Constitutional Law, p. 536; Cooley, Constitutional Limitations [5th ed.], p. 712; *Pingry v. Washburn*, 1 Aik. [Vt.], 264; *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S., 650.)

The rates fixed by the statute for the transportation of freight in the course of which a transfer switch is traversed are absolute and are conclusively imposed, whether actually reasonable or not. The rates are established finally, instead of being merely declared presumptively reasonable; and under the terms of the statute, judicial inquiry into the actual reasonableness of the rates is immaterial and improper; for this reason, the act takes property without due process of law, and also denies the equal protection of the laws, contrary to the federal and state constitutions. (*Chicago, M. & St. P. R. Co. v. State of Minnesota*, 134 U. S., 418.)

Wright, Hubbard & Bevington, John B. Hawley, and B. T. White, also for defendants in error.

RYAN, C.

This action was begun in the district court of Holt county, as shown by the prayer of the application for a writ of *mandamus* to compel the defendants to build, forthwith, a transfer or connecting switch at O'Neill, in said county, whereby the lines of the respondent railroad companies might be connected one with the other, and upon completion of said transfer switch to henceforth maintain the same in good condition and to receive and forward freight in car load lots offered by one road to the other offered on or over said transfer switch, and to place in force a joint schedule of rates between stations on the lines of each of said roads whereby freight in car load lots might be carried from a station on one road to a station on the other, which said rates should be for the rate for the shortest mile-

age by any railroad between the point of shipment and the point of destination; or, to show cause, by a day fixed, why said order should not be complied with, and, upon final hearing, that said order be made final, and for such other and further order as might be required and which a full and complete carrying out of the statute set forth in the application aforesaid should demand. It is not necessary to more fully state the nature of this action further than to say that by the application it was shown that the lines of railroad owned and operated by the defendant companies touched each other at O'Neill and at that point each received and delivered freight; that the board of transportation of the state of Nebraska, before the commencement of this action, had found a necessity for a transfer switch between said lines and had duly ordered the same to be constructed, and that the respondents, and each of them, had failed and refused to build and maintain such switch. The right to the relief above prayed was based upon the provisions of chapter 11, Laws, 1893. It is not possible to determine whether or not the connection by transfer switch could have been compelled, under the provisions of section 113, chapter 16, Compiled Statutes, for there are contained in the application no averments showing the existence of prerequisites indispensable under this section. A general demurrer to the petition by each defendant was sustained, and from the judgment of dismissal, thereupon following, plaintiff has prosecuted error proceedings to this court.

The first and second sections of chapter 11, pages 142, 143, Laws, 1893, contain the provisions concerning which most of the arguments in this case have been made. The enacting clause and these sections are in the following language:

"Be it enacted by the legislature of Nebraska:

"Section 1. That all railroads touching the same point in this state, at which point such railroads receive and deliver freight, or at some near point, shall build and maintain transfer switches for common use in transferring freight

State v. Sioux City, O'N. & W. R. Co.

in car load lots from one such railroad to another, and receive and forward such freight according to the provisions of this act; *Provided*, That the railroad interested may apply to the state board of transportation to be relieved of this duty in any case where its performance is unusually burdensome, and if, upon a personal examination of the locality where the transfer switches are to be put in, and taking testimony of the persons residing in the locality, by the secretaries of such board, they find it unjust and unreasonable to require the building of such transfer switches, then such board may relieve such roads of such duty, and that evidence from any locality along the lines of roads interested shall be considered by said board, and be competent testimony in such case.

"Sec. 2. That whenever a shipper of freight from any point in this state to any other point in this state over two or more lines of railroads to reach such point of destination, it shall be the duty of all such railroads as come under the provisions of this act to receive and deliver all such freight in car lots, on board cars upon such transfer switch. The railroad company at point of shipment shall make a through way bill to point of destination, and the rate to be charged for such shipment shall not be the sum of two or more locals, but shall be apportioned between the different roads according to the mileage of each necessarily used in such shipment, and shall be the rate for the shortest mileage distance by any railroad between point of shipment and point of destination."

The mandatory requirement of the first section is that railroad companies, situated as are the defendants, shall build and maintain transfer switches for transferring car load lots from one road to the other and receive and forward the same according to the provisions of said act. The case has been presented on both sides upon the theory that the clause, "according to the provisions of this act," relates to and qualifies each antecedent requirement; that is, of

putting in and maintaining the transfer switch as well as of receiving and forwarding freight. In this we think counsel correctly construed these provisions. In view of the fact that at the date of the passage of this act there was already in existence a section of the Compiled Statutes which required the construction of transfer switches, it is very clear that the main purpose of the act under consideration is to be found in its second section. The validity of this act will, therefore, be considered with reference to its chief object as defined in the said second section, rather than with reference to the duty to construct transfer switches,—a matter of minor importance.

In Iowa a transfer switch law was enacted by the legislature, of which some provisions resemble those found in the above act. It is not necessary that these should be copied or described at length, for the argument of the attorney general was based upon analogies sufficiently indicated by an opinion of the supreme court of that state filed in a cited case, to which we shall now refer. In *Smith v. Chicago, M. & St. P. R. Co.*, 53 N. W. Rep. [Ia.], 128, thus confidently relied upon by the plaintiff in error, there were considered but two questions. Of these, the first was whether the state was the proper party plaintiff. The other proposition decided is found correctly stated in the fourth paragraph of the syllabus thus: "Code, section 1292, provides that a railroad corporation whose road intersects or crosses any other line of railway of the same gauge shall connect its road with such other railway so intersected. Act 1878, section 3, provides that the railroad commissioners shall have general supervision of all the railroads in the state and inquire into any neglect or violation of the laws of the state. Acts 20 General Assembly, chapter 24, section 1 provides that corporations having intersecting roads shall, 'whenever ordered by the railroad commissioners,' unite and connect their tracks. Held, that the commissioners should order the connection of such tracks

State v. Sioux City, O'N. & W. R. Co.

only when they deem it best and need not do so regardless of its advisability." In this case the railroad commissioners had, in effect, found that there was no necessity for the connection sought to be required, but ordered it on the theory that the statute compelled them so to do whether the connection was necessary or not. How the supreme court of Iowa viewed the construction followed by the railroad commissioners is clearly indicated by the language above quoted. In the case just considered, however, there was involved no such question as that which chiefly concerns us in this case. Since we have had brought to our notice the holding of the supreme court of Iowa in one case, it may subserve a useful purpose to note that in *Smith v. Chicago, M. & St. P. R. Co.*, 55 N. W. Rep., [Ia.], 331 another ruling of that court has been made, which is correctly reflected in the following language of the syllabus: "An order of the railroad commissioners that the defendant railroad company transfer cars delivered to it by another company from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits and the service rendered is on the main line and is done under orders as in case of trains and not under the direction of the yardmaster." The court, in its opinion, said that if the order of the railroad commissioners was to be enforced by a decree, as prayed, such enforcement involved a change in the management of the company as to the classification and operation of its trains, and for this reason a demurrer to the petition containing the prayer above indicated was held to have been properly sustained. Indirectly there was thus considered one of the minor questions to which the law under discussion might naturally give rise; but as this question is not necessarily involved, we shall proceed to consider other questions which cannot be ignored.

It is insisted by the plaintiff in error that section 2 of

the act under consideration is not within the inhibition of the following language of section 1 of the fourteenth amendment of the constitution of the United States, to-wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." In the construction of the federal constitution and statutes, state courts must follow the supreme court of the United States. (*Franklin v. Kelly*, 2 Neb., 79; *Bressler v. Wayne County*, 25 Neb., 468.) In delivering the opinion of the court in *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362, Mr. Justice Brewer briefly reviewed the history of the adjudications of the United States supreme court respecting legislative control over railroads. As such a review is not inappropriate in the consideration of this case, and as no one is more likely to correctly summarize such history than Judge Brewer, his language is quoted, as follows: "In *Chicago, Burlington & Quincy Railroad v. Iowa*, 94 U. S., 155, and *Peik v. Chicago & Northwestern Railway*, 94 U. S., 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers but was subject to legislative control. As stated by Mr. Justice Miller in *Wabash, etc., Railway v. Illinois*, 118 U. S., 557, 569, in respect to those cases: 'The great question to be decided and which was decided, and which was argued in all those cases, was, the right of the state, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.' There was in these cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S., 307, 331, and while the right of control was reaffirmed, a limitation on that right was plainly intimated in the following words of the chief justice: 'From what

has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.' This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S., 680, 689. Again, in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U. S., 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court: 'The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination.' And in *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S., 339, 344, is this declaration of law: 'The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.' *Budd v. New York*, 143 U. S., 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: 'In the cases before us the records do not show that the charges fixed by the statute are unreasonable.' Hence, there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground."

Commenting upon the principles involved in the cases

which he had just reviewed Mr. Justice Brewer said: "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limits and guaranties, the forms of the law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *Chicago, M. & St. P. R. Co. v. Minnesota*, referred to in the above review of cases by Judge Brewer, the restrictions just referred to were applied to such facts and in such a manner as to illustrate their inhibitory force. In that case there was under consideration a law of Minnesota which empowered a commission to prescribe rates for the transportation of freight upon the several railroad lines in that state. Upon a failure of any railroad company to comply, within a fixed time, with the rate established by such commission, the commission was empowered by law to post such rate, which, thereupon, became as binding upon the railroad company concerned as though adopted and promulgated by its authority. Under the provisions of this law the supreme court of Minnesota had held that the rates thus published were the only ones that were law-

State v. Sioux City, O'N. & W. R. Co.

ful, and that therefore, in contemplation of law, the only ones that were equal and reasonable, and hence that, in a proceeding by *mandamus* to compel a railroad company to comply with this rate, there was no fact to traverse, except the alleged violation of the law in refusing compliance with the recommendations of the commission. In delivering the opinion of the majority of the supreme court of the United States, Mr. Justice Blatchford said: "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." That the rates referred to in the foregoing quotation were fixed by a commission to which that power had been delegated by the legislature of Minnesota, in principle, was the same as though the legislature itself had exercised that power, for the latter could not delegate to the former a power not possessed by itself. Considered independently of the entirely fortuitous circumstance that the commission had fixed the rates, the majority of the supreme court of the United States, in effect, held in *Chicago, M. & St. P. R. Co. v. Minnesota*, that it was not within the power of the legislature to provide, as an absolute finality, that only certain fixed rates could be charged by railroad companies for the transportation of freight. In the subsequently decided case of *Reagan v. Farmers Loan & Trust Co.*, *supra*, the entire court seems to have assented to the correctness of the following

proposition therein quoted from the majority opinion in *Chicago, M. & St. P. R. Co. v. Minnesota*, to-wit: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." As this seems unquestionably to be the conclusion established by the able review of the cases which has been hereinbefore quoted from *Reagan v. Farmers Loan & Trust Co.*, it should be accepted as such an authoritative construction of the part of the fourteenth amendment which is involved in this case that it must bind this court, whatever its views independently of this construction might have been.

In view of this construction by the supreme court of the United States placed upon the part of the fourteenth amendment with which we are now concerned, let us consider some of the provisions of the second section of the act entitled "An act to regulate railroads and to compel them to put in transfer switches," the same being chapter 11, Laws, 1893. The first sentence of this section is imperfect, but its evident meaning is that where freight shall be shipped over two or more lines of railroad, between points in this state, it shall be the duty of all such railroads to receive and deliver such freight in car lots, on board cars upon such transfer switch as connects their lines. By this section it is furthermore required that the railroad company at the point of shipment shall make a through way bill to the point of destination, the rate for the shipment not to be the sum of two or more locals, but for the shortest mileage distance by any railroad between the point of shipment and the point of destination. For the sake of illustration, let us suppose that a triangle is formed by three distinct lines of railroad within this state; that of each of two of these lines the length is one hundred miles and that the length

of the line on the third side is twenty-five miles. A shipper of a ton of hard coal, we will suppose, directs that his coal be sent from the intersection of the short line with one of the longer lines over both of the longer lines to the point at which such coal shall reach the extremity of the short line furthest from the initial point of shipment. It will thus be required to travel two hundred miles to reach its destination. It might have done so by traveling twenty-five miles. Chapter 24, Laws, 1893, has been held in *Ames v. Union P. R. Co.*, 64 Fed. Rep., 165, to have fixed inadequate rates, and the enforcement of this statute is now suspended by injunction; nevertheless we shall assume, for the mere purposes of illustration, that these rates afford as fair a basis between themselves for comparisons as any other that could be found. For hauling 2,000 pounds of hard coal a railroad company, under this maximum rate law, was permitted to charge for a distance of twenty-five miles the sum of seventy-six cents; for hauling the same ton of coal two hundred miles there might be required as compensation the sum of two dollars. It may be objected that this case is merely hypothetical, and that, practically, this supposed condition is impossible. Let us, therefore, suppose that a dealer finds it necessary to send a car load of hard coal from Omaha to Plattsmouth. For some reason, perhaps to avoid the payment of drayage charges, he elects to send the coal by way of Columbus, and, as he has the right under this law, he requires it billed over the Union Pacific railway to Columbus and thence over the Burlington & Missouri railway to Plattsmouth. There is by this route required to be traveled ninety-one miles over the line of the first named railway and one hundred and thirty miles over the other—in all two hundred and twenty-one miles. The same shipment might be made by the Missouri Pacific railway, in which case the haul would be but twenty-six miles. Referring again to the maximum rate law for what may be assumed to be relatively fair rates, at

least in the judgment of the legislature which passed the act under consideration, we find that the rate for twenty-five miles, the rate nearest approximating that for the distance between Omaha and Plattsmouth by a direct line (as stated in the first illustration) is seventy-six cents per ton, while by the lines in fact traveled, had they been in fact exactly two hundred and twenty miles, the rate would be two dollars and twenty cents per ton, that is one dollar and forty-four cents in excess of what could have been charged over the shortest available route, and these are but fair illustrations of the practical results brought about by chapter 11, Laws of 1893, and apparently, that there may be no means of avoiding this result, this law forbids any charges to be made for transfer switching. Even the reasonableness of the charge for transporting over the short line the supreme court of the United States, as we have already seen, has held is a question for judicial investigation, requiring the process of law for its determination. If, as was held in *Chicago, M. & St. P. R. Co. v. Minnesota*, the establishment of an arbitrary rate which deprived the railroad company of its right to a judicial investigation by due process of law under the forms and with the machinery provided for the investigation judicially of the truth of the matter in controversy, and the substitution therefor as an absolute finality of the action of a commission not clothed with judicial functions or possessed of the machinery of a court of justice, was in conflict with the constitution of the United States, there is no escape from the conclusion that a law which, as a finality, establishes a rate dependent, not upon the length of a haul by the route chosen by the shipper of freight, but by the length of a much shorter route of which he refuses to avail himself, is open to the same objection. No argument can be made to sustain this law, which equally would not tend to sustain those under which the supreme court of the United States held invalid the rates established by commissioners in Min-

State v. Sioux City, O'N. & W. R. Co.

nesota, and other rates fixed in a similar manner in Texas. This law, in addition to the objections held sufficient as against the statutory regulations of rates in Minnesota and Texas, is subject to the criticism that no railroad company can know, in advance, for what compensation it may be required to haul freights over its line. There is, therefore, no way by which we can escape the logical result of these conditions authoritatively declared by the supreme court of the United States sufficient to vitiate other legislative enactments in which but a portion of the objectionable features of the statute under consideration was embodied. The attempt to establish rates of compensation, as was done in chapter 11, Laws, 1893, must therefore be held to be in violation of the provisions of the fourteenth amendment and therefore to be nugatory.

It is, however, insisted by the plaintiff in error that, independently of legislative establishment of rates, it lies within the power of courts to define what rate over connecting lines is reasonable, and to enforce its observance. This question, too, has received the attention of courts and always, we believe, with the result reached in the cases we shall now review.

In *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation Canal & Land Co.*, 45 Neb., 884, Judge POST, for this court, said: "It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies as *quasi*-public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may, by the courts, be compelled to enter into particular agreements or assume particular relations, however just and equitable, towards each other. That subject has recently engaged the attention of the supreme court of the United States, by

which the power to prescribe terms for the interchange of business by connecting carriers is declared to be rather legislative than judicial in character, notwithstanding the provisions of the interstate commerce act. (*Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S., 667; *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587; *Express Cases*, 117 U. S., 1; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep., 559. See, also, Beach, *Private Corporations*, 839; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep., 567.) Such of these citations as refer to cases determined by the supreme court of the United States we shall now consider at such length as shall be profitable.

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, *supra*, Waite, C. J., delivering the opinion of the court, said: "A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other." Later in this opinion he said that it was not the law that every railroad company which forces a connection of its road with that of another company has a right under the constitution of Colorado, or at the common law, to require the company with which it connected to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. This, he said, might be made the law by the legislative department of the government, but it did not follow as a necessary consequence from the constitutional right of a mechanical union of tracks, or from the said constitutional prohibition against undue or unreasonable discrimination in facilities.

In *Pullman Palace Car Co. v. Missouri P. R. Co.*, *supra*, it was sought to compel the use of the cars of plaintiff over the line of the St. Louis, Iron Mountain & Southern Railway Company, though that company had been consolidated with the Missouri Pacific Railway Company. Waite, C. J., in the opinion delivered by him for the court in this case,

State v. Sioux City, O'N. & W. R. Co.

said: "The business [of the sleeping car company] is always done under special written contracts. These contracts must necessarily vary according to the special circumstances of each particular case. Certainly, it cannot be claimed that a court of chancery is competent to require these companies to enter into such a contract for the furnishing and hauling of the Pullman cars, as the court may deem reasonable. A mere statement of the proposition is sufficient to show that it is untenable."

In the *Express Cases*, *supra*, the circuit court had required by its decree that the railroad companies which were defendants should, as common carriers, afford each express company certain facilities for the transaction of its business as a common carrier, the character of such facilities to be the same as by virtue of a contract formerly in existence it had been the duty of each railroad company to provide. By this decree the rate of compensation to be paid had been fixed at not exceeding fifty per cent more than the railroad company's prescribed rate for the transportation of ordinary freight, and not greater than the railroad company would charge for the transportation of express matter on its own account, or for any other express or other corporation, or for private individuals, and a bond was required to secure such payment. The right of each party to apply for a modification of this decree under the rules in equity proceedings had been reserved by the decree itself as to the measure of compensation prescribed. In the opinion of a majority of the court, delivered by Waite, C. J., the following language was used: "The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as, in its

opinion, they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what these facilities must be, and it did so by declaring that they should be furnished to the same extent, and upon the same trains, that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that, we said in *Atchison, Topeka & Santa Fe Railroad Co. v. Denver & New Orleans Railroad Co.*, 110 U. S., 667, followed at this term in *Pullman Palace Car Co. v. Missouri Pacific Railway Co.*, 115 U. S., 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called on to give it effect."

The other citations in *Paxton & Hershey Irrigating Canal*

& Land Co. v. Farmers & Merchants Irrigation & Land Co., *supra*, need not be considered at length, for while inferior in authority, they follow the same line as do the cases above reviewed. The same doctrine was recognized in *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362.

Among the cases cited by the plaintiff in error is *Texas Express Co. v. Texas & P. R. Co.*, 6 Fed. Rep., 437, determined in the circuit court of the United States for the northern district of Texas, in which case it was said: "If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judicial department of the government to do this. When and how far it may become necessary or expedient to do so must be left to the legislature to determine and declare, and until the legislature does so provide, the parties hereto, and all others similarly circumstanced, must be remitted to their right and power to contract in reference to the compensation for such service, subject to the limitations placed upon defendants by their duties as exclusive public carriers on public highways, that their terms for carrying shall be reasonable and such as involve no unjust discrimination, to be determined in each particular case by the agreement of the parties in interest, and, in case of their failing to agree, to be determined by the proper court on full statement and proof of the particular case." The language of the latter part of the above quotation is relied upon by the attorney general to sustain the proposition that if the provisions of the statute cannot be upheld, this court may supply the deficiency, and, separated from its context, this part of the quotation, doubtless, tends strongly in that direction. This part of the quotation, however, is greatly qualified when we take into account that immediately preceding this portion favorable to the contention of the plaintiff in error it was said: "If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for

its carriage, it is most clearly not within the province of the judicial department of the government to do this."

From this review of the federal decisions with reference to this subject-matter it is clear that it does not lie within the power of courts to formulate contracts whereby shall be regulated the rights and duties of parties concerned, even though each of such parties is a common carrier. The practical difficulties which in the *Express Cases* surrounded, and in the judgment of the supreme court of the United States rendered futile, the attempt of the circuit court to define the duties of the express companies on the one hand, and the railroad companies on the other, apply with still greater force to the case at bar. In the *Express Cases* there were on either side the proposed parties to a contract relation which was to exist for a considerable space of time in the future and all these parties were in court. Between themselves, they had formerly been able, without difficulty, to make a contract which the circuit court believed sufficiently furnished analogies for all the points to be adjusted. In the case at bar the only criterion furnished for the adjustment of rates is that no more shall be charged for such haul as, by the election of the shipper, shall be made necessary, than that it must not exceed the cost of shipment by the shortest route possible. In this case there was before the district court no party interested in shipments other than the carrier, the parties who it was assumed propose to ship were unnamed and unknown, and there was no attempt to suggest the points between which shipment should be made or the compensation therefor which should be established. If it was impossible for the circuit court in the *Express Cases* practically to solve the problem with which it was confronted, there can be no question as to the futility of every effort of this or any other court to formulate rules or rates in compliance with the uncertain requirements of section 2 of chapter 11 of the Laws of 1893. The district court, therefore, very properly declined attempting the per-

Williams v. State.

formance of this hopeless task. There has been suggested no method by which the act under consideration can be put into effect which has not already been considered, and in justice to the attorney general it is but fair to say that, to sustain the provisions of this act, he has advanced every available argument and consideration which in our opinion is even plausible. The judgment of the district court is

AFFIRMED.

GEORGE S. WILLIAMS V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7929.

1. **Instructions: EVIDENCE.** An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous.
2. **Evidence: INSTRUCTIONS.** The effect of the evidence and the inferences deducible therefrom are for the jury; and for the court to instruct the jury that the evidence establishes a certain controverted fact in issue, is an unwarranted assumption of the functions of the jury.
3. **Homicide: INSANITY: EVIDENCE: INSTRUCTIONS.** Where, on the trial of a murder case in which the defense is temporary insanity, the court undertakes to detail in an instruction what evidence the jury may consider in determining whether the prisoner knew the killing was wrong, the court must impartially recite the material evidence offered both by the state and the prisoner to sustain their respective theories of the homicide.
4. ———: ———: ———: ———. It is prejudicial error for the court in such a case to group together in an instruction the important material facts put in evidence by the state as to the prisoner's sanity and omit all mention of the evidence produced by the prisoner tending to traverse that of the state.

ERROR to the district court for Jefferson county. Tried below before BUSH, J.

John Heasty and *W. H. Barnes*, for plaintiff in error:

The practice of giving instructions detailing the evidence and calling the attention of the jury to particular portions of the testimony, thus giving such testimony undue prominence, has been disapproved. (*City of Lincoln v. Beckman*, 23 Neb., 677; *Marion v. State*, 20 Neb., 233; *Long v. State*, 23 Neb., 33; *Markel v. Moudy*, 11 Neb., 213; *Burley v. Marsh*, 11 Neb., 291; *Kersenbrock v. Martin*, 12 Neb., 376.)

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *E. H. Hinshaw*, County Attorney, for the state.

RAGAN, C.

In the district court of Jefferson county, George Williams was convicted of the crime of murder in the second degree for the killing of one Charles A. Smiley and sentenced to imprisonment in the penitentiary for thirteen years. Williams brings the judgment of the district court here for review.

Of the errors assigned and argued we shall notice only one. Williams' defense was in substance that at the time he committed the homicide he was temporarily insane, being then and there deeply intoxicated and in a state of frenzied excitement resulting from such intoxication, and a vile and opprobrious remark made concerning his wife by Smiley, and an assault and battery inflicted upon him by Smiley. The district court charged the jury as follows: "The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendant did, upon the 20th day of August, 1894, have a quarrel with the deceased, and that deceased struck defendant and knocked him down; that defendant afterwards said that he would kill the deceased, and that he would get a gun and 'do him' before 12 o'clock; and that defendant did get

Williams v. State.

a loaded revolver, and follow and hunt up the deceased, and shoot and kill him; and thereafter stated that he had come down to kill the son-of-a-bitch, and hoped he had killed him; and when asked why he had killed the deceased pointed to a bruise or wound on his face where the deceased had struck him, and said, 'See what he done to me;' and when asked what he had killed deceased with, said, 'A brand-new 38, and a dam'd good one;' and that he had gone down to kill him, and hoped he had; and told his wife that he had got the revolver when she was at supper,—then the jury have a right to consider all these facts in determining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." This instruction was prejudicially erroneous for several reasons:

1. The court told the jury that if they found from the evidence that Williams said that he would "get a gun and do him before 12 o'clock," etc. The record contains no evidence of any such remark made by the prisoner. The jury could not find a fact outside the evidence, and the injustice to the prisoner in this part of the instruction was that the jury, without inquiry or reflection, were likely to take it for granted that the prisoner had made the threat because the court in its instruction assumed that he had. An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous. (*Frame v. Badger*, 79 Ill., 441.) If by an instruction a question material to the issue, and without any evidence to support it, be submitted to the jury, it is error. (*Dunbier v. Day*, 12 Neb., 596. See, also, for the same principle, *McCready v. Phillips*, 44 Neb., 790.)

2. Again, in the instruction the court said to the jury: "If you believe from the evidence that the defendant did get a loaded revolver and follow and hunt up the deceased," etc. No such fact was testified to in such language. We assume, for the purposes of this case, that such a fact was

inferable from the evidence, but who was to draw such an inference? The effect of the evidence and the inferences deducible therefrom were for the jury, not for the judge. By this statement the court assumed that the evidence warranted a certain inference, and in doing so he invaded the province of the jury. (*Prairie State Loan & Trust Co. v. Doig*, 70 Ill., 52; 2 Thompson, Trials, sec. 2290; *Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 105; *Terry v. Beatrice Starch Co.*, 43 Neb., 866.)

3. But the most serious defect in the instruction consists in this: In the instruction the court grouped together the important material facts put in evidence by the state to sustain its theory of the homicide and utterly ignored the evidence produced by the prisoner which tended to traverse the theory of the state. The evidence on behalf of the prisoner tended to show that at the time of the homicide he was suffering from a disease of the heart which rendered him easily excited; that he was deeply intoxicated; that the deceased had made a remark to him concerning his wife of the vilest and most opprobrious character; that he had assaulted and knocked the prisoner down, and that all these things had conduced and contributed to put him into an excited and frenzied state of mind to such an extent that he had lost control of himself and consciousness of his actions. We do not say that the evidence established this theory of the prisoner, but we do say that it tended in that direction, and whether this evidence warranted the conclusion which the prisoner claimed for it, was for the jury. It is to be observed that when the court comes to submit to the jury the question as to whether the prisoner at the time he shot Smiley knew that the killing was wrong, ignores all the evidence of the prisoner on the subject and picks out and holds up for the consideration of the jury only the claims of the state. After reciting the material facts proved by the state, the court said to the jury: "You have a right to consider all these facts in de-

termining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." The jury not only had the right to consider all the facts in evidence detailed by the court, but it had the right, and it was its sworn duty, to weigh and consider all the facts testified to by the defense in support of the theory of the prisoner. By this instruction the district judge practically said to the jury: "You consider the evidence that I have detailed to you and omit all consideration of evidence not detailed." When the court undertook to detail in an instruction what evidence the jury might consider in determining whether the prisoner knew at the time that the killing of Smiley was wrong, it was its duty to hold the scales of justice equally balanced, to give impartially to the jury the material evidence offered by the state to sustain its theory and the material evidence offered by the prisoner to sustain his theory. (*Markel v. Moudy*, 11 Neb., 213; *Burley v. Marsh*, 11 Neb., 291; *Kersenbrock v. Martin*, 12 Neb., 374; *Marion v. State*, 20 Neb., 233; *Long v. State*, 23 Neb., 33; *City of Lincoln v. Beckman*, 23 Neb., 677; *Carruth v. Harris*, 41 Neb., 789; *People v. Clarke*, 62 N. W. Rep. [Mich.], 1117.) In this last case it was said that an instruction in which the strong points of the evidence for the state were brought out while the evidence for the defendant was not so emphasized, and certain testimony which tended to negative material statements of the state's witness was not even referred to, was prejudicial to the defendant.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

Hards v. Platte Valley Improvement Co.

EBENEZER HARDS V. PLATTE VALLEY IMPROVEMENT
COMPANY.

FILED JANUARY 9, 1896. No. 7835.

1. **Corporations: SUBSCRIPTIONS FOR STOCK** The mere mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him.
2. **Trial: DIRECTING VERDICT.** It is the duty of a trial court to direct a verdict for the plaintiff if the evidence would not support a finding for the defendant.
3. ———: ———: **EVIDENCE.** The evidence examined, and held to justify an instruction of the district court to the jury to return a verdict for the plaintiff.

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

W. R. Watson and John Patterson, for plaintiff in error.

J. W. Sparks and A. Ewing, contra.

RAGAN, C.

Ebenezer Hards subscribed for \$100 of the capital stock of the Platte Valley Improvement Company, a corporation organized under the laws of the state of Nebraska for the purpose of erecting and operating a hall for the use of societies, organized meetings, etc. The domicile of the corporation was Central City, in Merrick county. Of the amount subscribed by him, Hards paid \$15, and this suit was brought by the corporation against him to recover the balance. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict for the corporation, and to reverse the judgment rendered thereon Hards has prosecuted to this court a petition in error.

Hards v. Platte Valley Improvement Co.

The assignments of error argued may all be included under one head, viz.: That the verdict and judgment are not supported by sufficient evidence. One of the defenses interposed by Hards to the action in the court below was that the promoters of the corporation represented to him that if he would subscribe for \$100 of the capital stock of the corporation, that its entire authorized capital stock of \$4,000 would then have been subscribed for by good, lawful, solvent, and good-faith subscribers; that, relying upon these representations, he subscribed for the \$100 of capital stock, and that such representations were false when made, and that the full amount of the authorized capital stock of the corporation, including his subscription, was not then taken and had never been taken. We find in the briefs of counsel a copy of a written opinion filed in the case by the district judge who tried the case. In this opinion the district court, speaking to this defense of the plaintiff in error, said: "I assume that the pleading is faultless, and proceed to inquire whether the defendant has made a case on the evidence. The burden of proof is on him. He must produce evidence tending in some degree to sustain the allegations of his answer or else fail in his defense. He says Stitzer, a promoter of the corporation who procured Hards' subscription, told him there were forty shares taken by good, responsible, *bona fide* subscribers. This is the important representation. If it was made and proved to be false as to the number of subscribers, their responsibility or good faith, there can be no recovery in this action. Whether the subscribers were good or not is immaterial, unless the word is used as synonymous with responsible, about which there may be doubt. It is conclusively shown that there were fifty-three shares of the stock of this corporation actually subscribed, and there is no evidence tending to show there was not at least forty shares taken by solvent *bona fide* subscribers." With this disposition of the defense under consideration made by the district court

we entirely agree, after an examination of the evidence in the record. Another defense interposed to the action by Hards was that he was induced to make the subscription sued upon because of representations made to him by the promoters of the corporation that it had obtained a lease of certain real estate in Central City from one Brinninger & Hostetter for ninety-nine years, and that this representation was false. We have been unable to find any evidence in the record which tends to sustain this defense, and upon looking into the opinion filed in the case by the district court we find his views as to this defense expressed as follows: "The representations, with reference to the lease from Brinninger & Hostetter, are, I am satisfied, well pleaded. But they are not, as it seems to me, sustained by a scintilla of proof." Another defense interposed by Hards was that some of the subscribers to the capital stock of the corporation had been induced to make such subscriptions upon representations made to them by the promoters that the capital stock of the corporation was to be \$6,000.

Recurring again to the opinion of the district court filed in the case we quote with approval what he says as to this defense: "But the defendant insists that some of these shares were taken in view of an increased capitalization and therefore should not be counted. It is perfectly clear there was no change in the capital stock. One was in contemplation by some of the members, and it is true that some of the shareholders may have become such upon the supposition that the capital stock was \$6,000. But they make no complaint; they have not repudiated their connection with the company. Besides the defendant is not their chosen champion. He cannot strengthen his defense by exploiting their grievances. The fact remains that this corporation has outstanding fifty-three shares of its stock, and the defendant has not produced evidence tending to show that there are less than forty of such shares in the

hands of *bona fide* and responsible subscribers." Still another defense interposed by Hards was that the corporation or its managing officers had permitted the persons, of whom the corporation leased the real estate on which was, or was to be, erected the corporation's building, to incumber such real estate with a mortgage of \$2,000. This averment, if true, constituted no defense to the action, as the mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him. (*Chellain v. Republic Life Ins. Co.*, 86 Ill., 220.) And once more we quote with approval that part of the opinion of the district court directed to this defense: "The defendant complains of the mismanagement of the affairs of the corporation, but that has not been held to release the stockholder from his contract to pay for his stock. When the defendant became a stockholder in the plaintiff corporation he became entitled to all the benefits, and subject to all the burdens incident to that relation. Had there been gains, he would have shared in them; and since there have been losses, he should, in common justice, help to bear them. If officers of a corporation act *ultra vires* to the prejudice of the stockholders, the latter, as the owners of the corporate property and franchises, may by a prompt intervention annul their acts and they may effectively invoke the restraining powers of the court to keep them within the scope of their delegated authority. Mismanagement of corporate officers, whether known or unknown to stockholders, will not operate to cancel the obligations of the latter to the corporation. The stockholders bear the same relation substantially to the corporate officers that the *cestui que trust* bears to the trustee, and has for the protection of his interest in the corporation the same remedies that are provided for the beneficiary in a trust estate. To these remedies he must resort, or bear the consequences of his omission so to do." If the jury had returned a verdict in favor of the plaintiff in error, it would have lacked evidence to support

Bartram v. Sherman.

it. It would have been the duty of the district court to have set it aside, and therefore the court did not err in directing a verdict for the corporation, and its judgment is

AFFIRMED.

WILLIAM BARTRAM ET AL., APPELLANTS, V. A. J.
SHERMAN, APPELLEE.

FILED JANUARY 9, 1896. No. 5866.

1. **Final Order: REVIEW.** An order to be final and reviewable on error or appeal must dispose of the merits of the case and leave nothing for the further judicial determination of the court.
2. **Order Dissolving Temporary Injunction: REVIEW.** No provision of the Code makes an order dissolving or modifying a temporary injunction reviewable except in connection with the final judgment rendered in the action of which the temporary injunction is an incident.

APPEAL from the district court of Gage county. Heard below before HASTINGS, J.

Griggs, Rinaker & Bibb, for appellants.

Alfred Hazlett and Fulton Jack, contra.

RAGAN, C.

William Bartram and Abbie Smith brought this suit in equity against A. J. Sherman, a road overseer, in the district court of Gage county. The object of the action was to enjoin the road overseer from tearing down certain fences and hedges which the plaintiffs alleged stood upon their land, and which they alleged the road overseer was threatening and about to tear down claiming they obstructed a public highway. The prayer of the petition of

Bartram v. Sherman.

the plaintiffs below was for a temporary order of injunction against the road overseer restraining him from interfering with the hedges and fences pending the hearing of the case, and that on a final hearing such injunction might be made perpetual. An answer and reply were filed and the case heard on oral evidence. It would seem from the record, though such fact does not affirmatively appear, that a temporary order of injunction was granted on the filing of the petition. After hearing the case the district court entered a decree as follows: "It is therefore considered by the court that the injunction heretofore granted in this cause be and the same is hereby dismissed." The plaintiffs below have appealed. This decree of the district court is not such a final order or judgment as disposes of the merits of the case and invests this court with jurisdiction to review it. By the decree of the district court the action brought by the appellants was not dismissed, but only the temporary order of injunction granted on the filing of the petition was dissolved.

By sections 679, 680, and 681 of the Code of Civil Procedure it is provided, in effect, that if a temporary order of injunction be dissolved or modified, it may still be kept in force by the party applying therefor on his giving a supersedeas bond for that purpose until the case is heard and finally determined. But no provision of the Code makes the order of a district court dissolving or modifying a temporary order of injunction reviewable except in connection with the final judgment rendered in the action of which the temporary injunction is an incident. In *Scofield v. State Nat. Bank of Lincoln*, 8 Neb., 16, it was held: "An order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action." In *Smith v. Sahler*, 1 Neb., 310, it was held: "An order to be final and subject to review in an appellate court upon appeal or petition in error must dispose of the

whole merits of the case and leave nothing for the further judicial determination of the court." In *Browne v. Edwards & McCullough Lumber Co.*, 44 Neb., 361, the decree was as follows: "The court, being fully advised in the premises, does sustain said motion, and said injunction is hereby vacated and dismissed." HARRISON, J., said: "There is nothing contained in the entry which can in the least be construed as alluding to the main case, or as an attempt to dispose of it in any manner or to any degree, * * * and we conclude, so far as the record discloses, there was and has been no final disposition of the case in which the temporary injunction was granted." We cannot entertain this appeal, because no final decree has been entered by the district court disposing of the main case on its merits, and because the decree of the district court dissolving or modifying the temporary order of injunction is not reviewable. The appeal, therefore, must be, and is, dismissed.

APPEAL DISMISSED.

ALBERT T. NICHOLS V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7914.

1. **Banks and Banking: EVIDENCE.** The law presumes that the relation existing between a bank and its customer is that of ordinary debtor and creditor.
2. ———: **DEPOSITS: EVIDENCE.** Whether a deposit made in a bank by its customer is a general or special one, is a question of fact to be determined from the intention of the parties; but in the absence of evidence the law presumes such a deposit a general one.
3. ———: **OVERDRAFTS.** Where a customer of a bank, who has overdrawn and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received toward the payment of such overdraft.

4. ———: **INSOLVENCY: PENALTY FOR RECEIVING DEPOSITS.** The object of the enactment of sections 22 and 23, chapter 8, Compiled Statutes, was to prevent an insolvent banking association from borrowing money,—that is, receiving money on deposit and becoming debtor therefor; but said sections should not be so construed as to render an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debts thereto, even though the association is at the time, to the officer's knowledge, insolvent.

5. **Unlawfully Receiving Deposits: BANKS AND BANKING. EVIDENCE.** N. was indicted for receiving a deposit in a bank of which he was cashier, knowing at the time that the bank was insolvent. The state, to sustain the indictment, offered evidence which tended to show the existence of the bank; that N. was its cashier; that it was insolvent to his knowledge on the 18th of February, 1895, and that on said date one M. deposited in said bank \$11. N. then offered to prove that when M. made such deposit he was overdrawn at the bank \$15.30. The court excluded the offer. *Held*, That the evidence offered tended to show that the deposit made by M. and accepted by N. was intended by the parties to apply towards the payment of M.'s debt to the bank, and that so long as N. remained lawfully in charge of the bank as its cashier, he had the right to accept money in payment of any debt owing by any person to the bank; and that, therefore, the court erred in excluding the evidence offered.

ERROR to the district court for Sherman county. Tried below before SINCLAIR, J.

Wall & Burrows and *H. M. Sullivan*, for plaintiff in error.

A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *Long & Mathew*, for the state.

RAGAN, C.

In the district court of Sherman county Albert T. Nichols was convicted of the crime of receiving a deposit in a bank of which he was cashier, the bank then and there being to his knowledge insolvent, and sentenced to a term in

the penitentiary. He brings the judgment of the district court here for review. There are numerous errors assigned and argued here for the reversal of this judgment, of which we shall notice only one. Section 22, chapter 8, Compiled Statutes, provides: "No bank, corporation, partnership, firm, or individual transacting a banking business in this state shall accept or receive on deposit for any purpose any money, bank bills, United States treasury notes, or currency, or other notes, bills, checks, drafts, credits, or currency, when such bank, corporation, partnership, firm, or individual is insolvent." Section 23 provides: "If any bank, corporation, partnership, firm, or individual transacting a banking business in this state shall receive or accept on deposit any such deposits as are named and set forth in section twenty-two (22), when said bank, corporation, partnership, firm or individual is insolvent, any officer, director, cashier, manager, member of the partnership or firm, individual or managing party thereof, who shall knowingly receive or accept, be accessory to, or permit or connive at the receiving or accepting on deposit therein or thereby any such deposits as aforesaid, shall be guilty of a felony," etc. The information charged that Nichols, being the cashier of the People's State Bank of Litchfield, a banking corporation organized under the laws of the state and doing business in said Sherman county, on the 18th day of February, 1895, received a money deposit of \$11 from one Henry Miller, the said People's State Bank of Litchfield being then and there, to the knowledge of said Nichols, insolvent. On the trial the state produced evidence showing the existence of the banking corporation; that Nichols was cashier thereof; and that on the 18th of February, 1895, one Henry Miller made a general deposit in said bank of the sum of \$11. And the state also offered evidence which tended to show that the said bank was on that date, to the knowledge of the said Nichols, insolvent. The record contains the following:

"JULY 13, 1895, 8 o'clock A. M.

"Argument to jury about to be commenced by County Attorney J. W. Long for the prosecution. Defendant here asks leave to withdraw his rest and to put on the witness stand O. S. McCurrie, by whom he can show that on the 16th day of February, 1895, the account of Henry Miller, the prosecuting witness herein, in the People's State Bank of Litchfield, Nebraska, was overdrawn \$15.30, and that no deposit was made by him on the 17th; and that the first deposit made or money brought in to the bank by him after the 16th was the \$11 charged in the information in this case; and at the time it was brought in, the said Henry Miller was overdrawn in his account with said bank in the sum of \$15.30."

"The counsel for the state object, as immaterial, irrelevant, incompetent, and too late at this time."

"The court: The request is denied for the reason that the fact sought to be shown is immaterial, irrelevant, incompetent, and not because it is too late. Defendant excepts."

The evidence shows that Miller was a customer of the bank, and this being so, the relation which the law presumes existed between them was that of debtor and creditor. (*Marine Bank v. Fulton Bank*, 2 Wall. [U. S.], 252; *Thompson v. Riggs*, 5 Wall. [U. S.], 663; *Bank of the Republic v. Millard*, 10 Wall. [U. S.], 152.) The evidence tends to show that the deposit made by Miller on the 18th was a general one. Whether the deposit was a general or special one was of course a question of fact to be determined from the intention of the parties, but a deposit is presumed to be a general one in the absence of evidence to the contrary. (*Brahm v. Adkins*, 77 Ill., 263; *In re Franklin Bank*, 1 Paige Ch. [N. Y.], 249; 1 Morse, Banks & Banking, sec. 186.) Since the relation existing between Miller and the bank was that of debtor and creditor, and since the offer was to show that Miller was overdrawn at

the bank—that is, that he was indebted to the bank in open account—in the sum of \$15.30 when he made the deposit of \$11 on the 18th of February, the presumption of law is, in the absence of evidence to the contrary, that he made this deposit in payment, so far as it would reach, of his debt or overdraft to the bank. (*Hansen v. Kirtley*, 11 Ia., 565; *Poucher v. Scott*, 98 N. Y., 422.) If the bank on the date that Miller made his deposit was insolvent, and if Nichols knew that fact, yet so long as he remained lawfully in charge of the bank, he had the right as its cashier to accept money in payment of any debt owing by any person to the bank; at least by so doing he did not violate the statute just quoted. The deposit made by Miller in the bank on the 18th was in the nature of a loan to the bank. (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Indiana, v. Gandy*, 11 Neb., 431; *State v. Bartley*, 39 Neb., 353.) And had Miller not been indebted to the bank in a sum equal to the deposit he made, then Nichols, knowing the insolvent condition of the bank and taking the deposit, would doubtless have violated the statute; for the very object of this enactment was to prevent an insolvent banking association from borrowing money, that is, receiving money on deposit and becoming a debtor to a depositor therefor; but we do not think that the act should be so construed as to make an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent. To give it this construction is to obey the letter of the law and to violate its spirit. Under the evidence in the record and that offered by Nichols and excluded by the court, the \$11 received by Nichols from Miller on the 18th of February, and put to Miller's credit on the books of the bank, was not an acceptance by Nichols as cashier of that amount of money to be held on deposit for Miller within the meaning of the statute quoted, but was an acceptance of that amount

Deering v. Wisherd.

of money by Nichols from Miller in payment of the latter's debt in open account to the bank. The district court erred in excluding the evidence offered. Its judgment is reversed and the cause remanded with instructions to grant Nichols a new trial.

REVERSED AND REMANDED.

WILLIAM DEERING & COMPANY V. JOHN A. WISHERD.

FILED JANUARY 9, 1896. No. 5833.

1. **Sheriffs and Constables: POSSESSION OF ATTACHED PROPERTY: DAMAGES.** It is the duty of an officer who seizes personal property on a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthcoming to answer the judgment of the court; and for a neglect of this duty such officer and his sureties are liable to the party injured thereby.
2. ———: ———: **COSTS.** Where an officer seizes the property of a defendant on a writ of attachment he may lawfully return as costs in the attachment proceeding all the actual, necessary, and reasonable charges and expenses which he has incurred in the taking possession, removal, and preservation of the attached property.
3. **Attachment: COSTS.** On the discharge of an attachment the costs and expenses incident thereto should ordinarily be taxed to the party suing out the attachment.

ERROR from the district court of Madison county. Tried below before POWERS, J.

Thomas D. Crane, for plaintiff in error:

The authority to tax costs is strictly statutory. Every item entered against a party must find its warrant in some statutory provision. There is no statutory authority permitting an officer to return as fees, or a court to tax as costs, anything for the care or custody of attached property upon

Deering v. Wisherd.

dissolution of the attachment. (*Reed v. Smith*, 25 Neb., 64; *Genesee County Savings Bank v. Ottawa Circuit Judge*, 54 Mich., 305; *Stanton County v. Madison County*, 10 Neb., 308; *Cramer v. Oppenstein*, 27 Pac. Rep. [Colo.], 713.)

Allen, Reed & Ellis, contra.

RAGAN, C.

William Deering & Co. sued John A. Wisherd, at law, in the district court of Madison county and at the same time caused an attachment to be issued for the seizure of Wisherd's property. On the 26th day of September, 1890, the sheriff, by virtue of the writ of attachment, seized and took into his possession the following property belonging to Wisherd: Two stacks of hay, twenty-nine head of hogs, shoats, and pigs, three colts, one team of bay mares, five head of horses and ponies, eight head of cows, heifers, and calves, one bull, two hundred acres of corn—standing in the field—three listers, one tricycle plow, two wagons, one hay rack, one set of harness. This property the sheriff retained in his possession until the 22d day of April, 1891, on which date he returned it to Wisherd, the court having on said date dissolved the attachment. The sheriff, on his return to the writ of attachment, charged in the attachment suit the following bill of costs:

Service and return.....	\$0 50
Copy	25
Mileage.....	1 50
Making levy	1 00
Calling appraisers.....	50
Swearing the same	50
Fees of the same.....	4 00
Making appraisalment.....	1 00
Taking care of and feeding horses and cattle from Sep. 26, 1890, to April 22, '91, 209 days at \$2.00 per day.....	418 00

Deering v. Wisherd.

Husking 200 acres of corn, estimated at 2,000 bushels, at .05 per bushel.....	\$100 00
7 trips to Wisherd's ranch, 28 miles.....	2 80
Expenses to Omaha and return.....	20 00
Total.....	\$550 05
Rec'd of plaintiff's attorney.....	2 00
Balance	\$548 05

The district court, on motion of Wisherd, made an order taxing these costs to Deering & Co., and to reverse this order the latter have prosecuted to this court a petition in error.

1. It is first argued that the finding and judgment of the district court are not supported by sufficient evidence. This contention is especially directed to the items of \$418 and \$100, charged by the sheriff for taking care of the live stock and husking the standing corn. The evidence is undisputed that the sheriff caused the standing corn to be husked, and that he employed a man and put him in charge of all the property levied upon the day it was seized and kept him in charge of the same until the attachment was discharged. Whether the expenses incurred by the sheriff in feeding and taking care of the live stock and the prices paid by him for husking the corn were reasonable charges and expenditures was a question submitted to the court on conflicting evidence; but such evidence supports the finding of the court.

2. Counsel for plaintiff in error next says that "there is no statutory authority permitting an officer to return as fees or a court to tax as costs anything for the care or custody of attached property; but counsel have overlooked the statute. Section 26, chapter 28, Compiled Statutes, is as follows: "That in all cases where writs of attachment against property are issued the officers to whom such writ is directed for service shall be empowered to demand in

Deering v. Wisherd.

advance and receive before said service the regular fees for service of papers and in addition thereto a sum of money sufficient to defray the expenses incurred for work and labor in the taking possession of or removal of the property ordered attached and for the safe keeping thereof, said sum to be taxed in the costs." If the sheriff might lawfully demand of Deering & Co., in advance, a sum of money sufficient to defray the expense of taking possession of and preserving the property attached, it logically follows that he might lawfully return as costs in the attachment suit all actual necessary and reasonable charges and expenses which he had incurred in the taking possession, removal, and preservation of the attached property. In the case at bar, as already stated, a part of the attached property was 200 acres of standing corn. The district court was of opinion, and we agree with him, that the sheriff kept within the line of his duty when he caused this corn to be husked and thus preserved. The sheriff hired a man to husk this corn, and the preponderance of the evidence is with the finding of the court that the price paid was a fair, reasonable, and usual price for husking such a crop as this was. The sheriff kept the attached stock on the ranch where it was when attached, and hired a man at the rate of \$2 per day to look after this stock, preserve it, keep it together and feed it, and the court found, and the evidence supports his finding, that this was a necessary and reasonable precaution on the part of the sheriff, and that the price he paid the man hired was a reasonable and fair compensation. It is the duty of an officer who seizes personal property under an execution or a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthcoming to answer the judgment of the court, and for a neglect of this duty such officer and his sureties would be liable to the party injured thereby. It would be an intolerable hardship for the law to require of an officer, when he should seize personal property in obedi-

State v. Roper.

ence to a writ of attachment, to preserve it at his peril and at the same time deny to him a reimbursement of the actual necessary and reasonable expenses incurred in performing his duties. It was to prevent just such an injustice that the legislature enacted the statute quoted above. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL, V.
GEORGE W. ROPER ET AL.

FILED JANUARY 16, 1895.* No. 7387.

1. **Relocation of County Seat: CONSTRUCTION OF STATUTE.**

Section 1, article 3, chapter 17, Compiled Statutes, 1893, construed, and *held*, (1) that within the meaning of this statute a county seat shall not be relocated in any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; (2) that the law presumes when such an election is held all the electors of the county vote at such election.

2. —: **ELECTIONS: MANDAMUS.** In a *mandamus* proceeding to compel the officers of Red Willow county to remove their offices to, and perform the duties of their office at, the city of McCook the application alleged: "That on the 1st of August, 1892, a special election was held in said county for the relocation of the county seat thereof; that the county seat at that time and for more than five years prior thereto had been located at the city of Indianola; that neither previous to nor since said date had any election been held in said county for the relocation of the county seat thereof; that the canvass of the votes cast at such election showed the following results: Votes in favor of Indianola, 867; votes in favor of McCook, 1,339; rejected ballots, 1; blank ballots, 3; ballots written for McCook and not counted, 2; ballots not accounted for, 25; total number of names of electors on poll-books, 2,237." *Held*, (1) That the twenty-five ballots "not accounted for" constituted a part of the "vote cast" at

* Publication withheld pending rehearing. See 46 Neb., 730.

the election, within the meaning of the statute; (2) that the law presumes that every elector whose name appears upon the poll-books was present and voted at the election; (3) that in order for the result of the election to locate the county seat at McCook three-fifths of 2,237 votes must have been cast in favor of that city; (4) that as the application failed to show such fact it did not state a cause of action.

3. Elections: RESULT. *State v. Bechel*, 22 Neb., 158, reaffirmed.

ORIGINAL application for *mandamus* to compel the county officers of Red Willow county to remove their offices from Indianola to McCook. *Writ denied*.

Marquett, Deweese & Hall, A. J. Rittenhouse, and W. S. Morlan, for relator.

S. R. Smith, W. R. Starr, H. W. Keyes, Reese & Gilkeson, and Sidney Dodge, contra.

RAGAN, C.

This is an application for a peremptory writ of *mandamus* to compel the respondents, who are officers of Red Willow county, to forthwith remove their offices from the city of Indianola to the city of McCook, in said county, and to hold their offices and perform their respective duties as such officers at said city of McCook. It is alleged in the petition or application that on the 1st of August, 1892, a special election was held in said county for the relocation of the county seat thereof; that the only places voted for at said election were the city of McCook and the city of Indianola; that the county seat of Red Willow county was at the time of holding said election, and for more than five years prior to that time had been, located in the city of Indianola; and that neither previous to nor since August 1, 1892, had any election been held in said Red Willow county for the relocation of the county seat thereof. The application further alleges that at said special election there were cast for the relocation of the county seat of said

county 1,341 votes in favor of relocating the county seat at the city of McCook, and 867 votes in favor of relocating said county seat at said city of Indianola. The application further alleges: "At said election more than three-fifths of all the votes cast were for the relocation of the county seat of said county at said city of McCook. On the 4th and 5th days of August, 1892, said votes were duly canvassed. A true copy of the canvass of said votes which was duly published or declared and the return of the canvassing board of the votes cast at said election is as follows: For the relocation of the county seat—At Indianola, 867 votes; at McCook, 1,339 votes; ballots not reported or accounted for, 25; ballots rejected, 1; blank ballots, 3; ballots written for McCook and not counted, 2; total vote, 2,237."

Does this petition or application state facts sufficient to constitute a cause of action? It will be observed from the quotations made above from the application that at the special election for the purpose of relocating the county seat there were cast at said election 2,237 votes. Section 1, article 3, chapter 17, Compiled Statutes, 1893, provides that where an election is held for the purpose of relocating the county seat of a county, "Any place receiving three-fifths of all the votes cast shall become and remain * * the county seat of said county." The theory of the relator seems to be that as Indianola and McCook together received 2,206 votes, and that more than three-fifths of these were cast in favor of McCook, therefore the result of the election was to relocate the county seat at the latter city. Is this the correct construction of the statute just quoted; or, does the statute mean that the county seat shall be declared relocated at that place which receives three-fifths of all the votes cast at the election held for the purpose of relocating the county seat?

Section 5, article 10, of the constitution provides: "The legislature shall provide by general law for township or-

ganization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine." A proposition to adopt township organization was submitted to the voters of Lancaster county at the November, 1877, election. At the election held at that time there were cast 2,451 votes; 952 were cast in favor of, and 601 votes were cast against, the proposition. The county commissioners refused to complete township organization as provided by the law, and application was made to this court for a peremptory writ of *mandamus* to compel the county commissioners of Lancaster county to complete township organization in said county by dividing the county into towns and appointing town officers, etc.; and this court, construing the constitutional provision quoted above, held that in order to adopt township organization a majority of all the legal voters of the county voting at the election must be recorded in favor of township organization. (See *State v. County Commissioners of Lancaster County*, 6 Neb., 474.)

Section 2 of article 11 of the constitution of the state, entitled "Miscellaneous Corporations," provides: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town or incorporated village without first requiring the consent of a majority of the electors thereof." Section 4, article 7, chapter 72, Compiled Statutes, provides that the question of the consent of a majority of the electors of any municipality to the construction and operation of a street railroad in its limits should be determined by submitting the question to the electors of such municipality; and by section 5 of said article it was also provided that such election should be held in the same manner and at the same places as the general city elections, and the returns should be canvassed by the council of said city and the result declared; "and if a majority of the votes cast at such election shall be in favor of the constructing

and operating such proposed street railroad, the council shall cause the city clerk to make out a certificate of the result, stating that the consent of a majority of the electors of such city has been given to the constructing and operating of such railroad." (Session Laws, 1877, p. 136, sec. 5.) The Omaha & South Omaha Street Railroad Company applied to the electors of the city of Omaha for consent to construct and operate a street railroad in the streets of said city. The question as to whether the electors of said city would consent to such request of the street railroad company was submitted to and voted upon by the electors of said city at the general election held therein on the 3d of May, 1887. There were 8,146 votes cast at such general election. On the question of consent to the street railroad company to build and operate its road in the streets there were cast 1,650 votes, of which 1,470 were in the affirmative and 180 in the negative. The result of the election having been certified to the city council, that body refused to cause the clerk of the city to certify to the street railroad company the necessary consent for it to operate and build its street railway in the streets thereof, but on the contrary declared that the consent of the electors of the city that the street railroad company might build and operate its road had not been given. The street railroad company then made application to this court for a peremptory writ of *mandamus* to compel the city council and city clerk of the city of Omaha to make out a certificate of the result of the election, stating that the consent of the majority of the electors of said city had been given to the street railroad company to construct and operate its street railway in the streets of said city; and this court, construing said section 5 quoted above, held that as the majority of all the votes cast at the election, or more than one-half of 8,146 votes, were not cast in favor of the street railway company, the result of the election did not confer the consent of the electors of the city of Omaha upon the street railway company to construct and operate its

road in the streets of said city. (See *State v. Bechel*, 22 Neb., 158.) This case is decisive of the question at bar. Here the application shows that at the election held for the purpose of relocating the county seat of Red Willow county there were cast at such election 2,237 votes, and in order for the result of this election to relocate the county seat at McCook three-fifths of all the votes cast at the election; or three-fifths of 2,237 votes, must have been cast in favor of McCook. The meaning of the law is that a county seat of a county shall not be relocated at any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; and the law presumes that when such an election is held that all the electors of the county vote at such election. The votes cast for Indianola and for McCook, the three blank ballots cast, the one ballot rejected, and the two ballots written for McCook and not counted do not constitute the entire vote cast. There were on the poll-books of the various voting places recorded as voting the names of 2,237 electors. The votes of all these electors are accounted for except twenty-five; but as the twenty-five electors registered as voting, we must presume they voted either blank ballots or for some place other than either McCook or Indianola. Those ballots, though unaccounted for, constitute a part of the whole vote cast, within the meaning of the statute; in other words, a name registered on the poll-book is a vote cast. The law requires the clerks of an election to enter on the poll-books the name of each elector at the time he votes. We cannot presume that the clerks of this election entered upon the poll-books the names of twenty-five electors who in fact were not present and did not vote. On the contrary, we must presume that every elector whose name appears upon the poll-books was present and voted at the election. (*Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322.) The writ is denied and the application dismissed.

WRIT DENIED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL, v.
GEORGE W. ROPER ET AL.

FILED JANUARY 9, 1896. NO. 7387.

1. **Relocation of County Seat: ELECTIONS: FRAUD: MANDAMUS.** On an application for a *mandamus* to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns and investigate issues of fraud and illegality in the manner of conducting the election.
2. ———: ———: ———: **PLEADING.** An answer in such a case tendering such issues presents no defense.
3. ———: ———: **MANDAMUS.** In an appropriate case the court will by *mandamus* enforce the *prima facie* right established by the canvass, but it will not determine the ultimate right.

REHEARING of original application for *mandamus* to compel the county officers of Red Willow county to remove their offices from Indianola to McCook. For former opinion, see 46 Neb., 724. Heard on motion of relator to strike out portions of the answers. The issues are stated by the commissioner. *Motion sustained.*

J. W. Deweese, A. J. Rittenhouse, and W. S. Morlan, for relator:

The material matters set forth in the answers which the relator has moved to strike out involve the decision of a political question, and may not be tried in a court upon which jurisdiction has not been conferred by the legislature. (*Wright v. Fawcett*, 42 Tex., 203; *Parmeter v. Bourne*, 35 Pac. Rep. [Wash.], 586; *State v. Dortch*, 41 La. Ann., 846; *State v. Police Jury*, 43 La. Ann., 1009; *Reynolds & Henry Construction Co. v. Police Jury*, 44 La. Ann., 863; *Dickey v. Reed*, 78 Ill., 261.)

The supreme court has no original jurisdiction in election cases. (*Miller v. Wheeler and Crawford v. Norris*, 33 Neb., 765; *Bell v. Timplin*, 26 Neb., 249; *Scott v. McGuire*, 15 Neb., 305.)

An election cannot be contested in a *mandamus* proceeding, and in such a case the court will not go behind the returns and inquire into the legality of the votes cast. (*Cameron v. Parker*, 38 Pac. Rep. [Okla.], 14; *State v. Dodson*, 21 Neb., 218; *State v. Jaynes*, 19 Neb., 161; *Houston v. Steele*, 28 S. W. Rep. [Ky.], 662; *State v. Nemaha County*, 10 Neb., 32; *State v. Powell*, 10 Neb., 48; *McGee v. State*, 32 Neb., 149; *State v. Palmer*, 10 Neb., 203; *Anderson v. Colson*, 1 Neb., 172; *State v. Plambeck*, 36 Neb., 404; *Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442; *State v. Wilson*, 24 Neb., 139; *State v. Elder*, 31 Neb., 169.)

The intervenors had another adequate remedy at law, and therefore cannot try in this action the material matters moved to be stricken out of their answers, in *mandamus* proceedings. (*Anderson v. Colson*, 1 Neb., 172; *State v. McCrillus*, 4 Kan., 250; *Eyke v. Lange*, 63 N. W. Rep. [Mich.], 535; *Ex parte Heath*, 3 Hill [N. Y.], 42; *Commissioners of Yorktown v. People*, 66 Ill., 339; *Excelsior Mutual Aid Association v. Riddle*, 91 Ind., 84.)

The district court had original jurisdiction to try the contest of the county seat election. (*Scott v. McGuire*, 15 Neb., 305; *Burke v. Perry*, 26 Neb., 414; *Ayers v. Moan*, 34 Neb., 210; *Crews v. Coffman*, 36 Neb., 824; *Gibson v. Trinity County*, 22 Pac. Rep. [Cal.], 225; *Albert v. Twohig*, 35 Neb., 568; *Biggs v. McBride*, 21 Pac. Rep. [Ore.], 878; *Packard v. Richardson*, 17 Mass., 143; *Curtis v. Leavitt*, 15 N. Y., 217; *People v. Fitch*, 1 Cal., 523.)

Where the statute prescribes a specific and adequate remedy, this must be pursued to the exclusion of all other remedies. (*State v. Stewart*, 26 O. St., 216.)

S. R. Smith, W. R. Starr, H. W. Keyes, and Reese & Gilkeson, contra:

In answering to the merits the relator waived his right to be heard upon the motion. (Code of Civil Procedure, sec. 92; *Bell v. Sherer*, 12 Neb., 411; *Moore v. Glover*, 16 N. E. Rep. [Ind.], 163; *Ludlow v. Ludlow*, 9 N. E. Rep. [Ind.], 769.)

Statutes providing for contests of election, unless clearly exclusive, are only cumulative remedies. (High, Extraordinary Remedies, sec. 624; McCrary, Elections, sec. 334.)

Before a writ of *mandamus* will issue the court has a right to inquire into every fact necessary to determine whether or not the relator is entitled to the relief prayed for, and to that end may go behind the certificate and returns. (*State v. Barber*, 32 Pac. Rep. [Wyo.], 14; *People v. Rice*, 129 N. Y., 390.)

The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office or to claim a certificate of election, and the court will go behind the returns and hear evidence upon issue joined. (*State v. Albin*, 44 Mo., 346; *State v. Stevens*, 23 Kan., 456; *State v. Newman*, 91 Mo., 445; *State v. Williams*, 99 Mo., 291; *State v. McGregor*, 44 O. St., 628; *State v. Lesueur*, 103 Mo., 253; *Sherburne v. Horn*, 45 Mich., 160.)

The legality of the election of relator may be tested in *mandamus* proceedings. (*Kimball v. Lamprey*, 19 N. H., 215; *Waller v. Belding*, 24 Vt., 658; *Burr v. Norton*, 25 Conn., 103.)

On a petition for *mandamus* to compel a county clerk to remove his records to a place claimed to have been designated as the permanent county seat, the facts stated in the petition are traversable, and a peremptory writ should not issue. Where fraud and corruption are set up and alleged in the answers of the respondents, the court should permit the same to be proved. (*State v. Avery*, 14 Wis., 133; *State*

State v. Roper.

v. Grace, 25 Pac. Rep. [Ore.], 382; *State v. Thatch*, 5 Neb., 94; *State v. Marston*, 6 Kan., 524; *State v. Stevens*, 23 Kan., 456; *People v. Jones*, 20 Cal., 50; *Keough v. Board of Aldermen of Holyoke*, 31 N. E. Rep. [Mass.], 387; *Hunter v. State*, 14 Neb., 506; *Boren v. Smith*, 47 Ill., 482; *State v. Hamilton County*, 35 Kan., 640; *McWhirter v. Brainard*, 5 Ore., 426; *Calaveras County v. Brockway*, 30 Cal., 326; *State v. Saxton*, 11 Wis., 25; *State v. Larrabee*, 1 Wis., 178; *Attorney General v. Fitzpatrick*, 2 Wis., 397; *State v. Lean*, 9 Wis., 254; *State v. Fetter*, 12 Wis., 632.)

Where the record shows an honest dispute as to a material fact, the writ should not issue. (*People v. Board of Police of City of New York*, 13 N. E. Rep. [N. Y.], 920; *State v. Washington County*, 2 Chand. [Wis.], 250; *Free Press Association v. Nichols*, 45 Vt., 7; *People v. Salomon*, 46 Ill., 419; *People v. Mayor of Chicago*, 51 Ill., 28; *Commissioners of Yorktown v. People*, 66 Ill., 339; *Springfield & I. S. R. Co. v. Wayne County*, 74 Ill., 27; *People v. Trustees of Schools*, 86 Ill., 613; *People v. Town of Oldtown*, 88 Ill., 202; *State v. New Haven & North Hampton Co.*, 45 Conn., 331; *State Board of Education v. City of West Point*, 50 Miss., 638; *Sabine v. Rounds*, 50 Vt., 74; *Cook v. Town of Peacham*, 50 Vt., 231; *Tyler v. Taylor*, 29 Gratt. [Va.], 765; *Townes v. Nichols*, 73 Me., 515; *People v. Auditor General*, 36 Mich., 271.)

Where an officer has been illegally elected, *mandamus* will not issue to aid him in getting possession of the office. (*Collins v. State*, 8 Ind., 344; *Gulick v. New*, 14 Ind., 93.)

Sidney Dodge, also for respondents.

IRVINE, C.

This is the same case which was before the court some months ago and in which an opinion was filed denying the writ prayed for. (*State v. Roper*, 46 Neb., 724.) The decision was based upon the ground that the application did

not show that the relator was entitled to the relief sought. A rehearing was allowed on relator's motion. Certain petitions of intervention, accompanied by answers, were filed, and the case is now presented on the motion of the relator to strike out portions of these answers. The former opinion discloses the material allegations of the application. The intervenors are certain county officers not named as respondents in the application, and certain citizens, electors and taxpayers of Red Willow county, who allege that as such they are interested in the retention of the county seat at Indianola. The answers are substantially alike. They admit the calling of the election and the facts rendering the call legal; admit that the only places voted for were McCook and Indianola; admit the institution in the district court of a contest of the election and an appeal to the supreme court, and allege that the supreme court dismissed the whole case for want of jurisdiction in either court, and admit the official capacity of the original respondents. The other allegations are denied. The intervenors further allege that the total number of votes, legal and illegal, was 2,237, of which there were but 1,339 for McCook, being less than three-fifths of the whole number of votes cast. So far the answers are not attacked. The motion goes, however, to all the rest of the answers, the allegations of which are, in brief, as follows: That the county owns land and a commodious court house and jail in Indianola, and no buildings or other property at McCook; that Indianola has a more convenient geographical location, and that a majority of the citizens and electors do not desire the removal of the county seat. These allegations must clearly be stricken out. If the requisite number of voters at a valid election expressed themselves in favor of removal, it is clear that a removal cannot be defeated in subsequent judicial proceedings on the ground last stated. The question before the court cannot go farther than the ascertainment of the legal expression of the electors' desires when the election was held. It can-

not extend to matters of convenience and present wish of the electors. Further, the intervenors charge that McCook was a city of more than 2,500 inhabitants, and that there was no registration of the voters therein; that a large number of illegal votes for McCook were cast in certain precincts; that the relators and others offered rewards and bribes for votes for McCook in the way of pledges of money and land for a court house; that certain voters were bribed to vote for McCook; that void ballots were counted for McCook, and that challengers were wrongfully kept from the polls. The motion to strike out these allegations presents the question whether in an application for a *mandamus* of this character the court may go behind the returns and inquire into the legality of the election.

In an early case in this court (*Anderson v. Colson*, 1 Neb., 172) there was an application to compel a county treasurer to pay over to the relator, who claimed to have been elected school district treasurer, moneys to which the school board was entitled. The answer alleged facts in contravention of the legality of the relator's election. The case was heard on these pleadings. This court held that the pleadings disclosed that there was a dispute as to the right to the office; that such a question could not be tried on an application for a *mandamus*, and, therefore, dismissed the petition. *State v. Thatch*, 5 Neb., 94, was an application similar to this. The answer alleged in general terms and upon information and belief that the election was fraudulent and illegal. The court held that the answer, by failing to state the facts on which the charge of fraud was based, was insufficient, and therefore awarded the writ, adding *obiter*, that if it were made to appear clearly that a sufficient number of illegal votes had been cast in favor of the successful town to give it a majority, this would be sufficient cause for the court to refuse its aid. In view of the decision in *Anderson v. Colson*, *supra*, we take it that what was in the mind of the court was that if a sufficient an-

swer of such a character was filed, the court would not try the issues in the *mandamus* case but would pursue the course adopted in *Anderson v. Colson*, dismiss the case, and leave the parties to appropriate proceedings to determine the validity of the election.

In *People v. Hamilton County*, 3 Neb., 244, the application was similar to that before us, and the writ was denied because no sufficient notice had been given of the election. The effect of the decision is that the requirement of a notice of elections of this character is mandatory, and without such a notice the election is absolutely void. The question then being not whether the election had been fairly and legally conducted, but whether there had been any election. This case is not in point. *Hunter v. State*, 14 Neb., 506, was a similar application. It does not appear what the answer was. The court reaffirmed *State v. Thatch*, *supra*, as to the requirements of such an answer, and then decided that the introduction in evidence of a petition for an injunction to restrain the officers from removing the county seat proved only the fact of the pendency of such an action, and did not prove the facts alleged in the petition for the injunction. Beyond this, expressions in the opinion are entirely *obiter*. *Scott v. McGuire*, 15 Neb., 303, was the injunction case referred to in *Hunter v. State*. The court held that an injunction would not be granted to restrain the removal of a county seat on allegations attacking the legality of the conduct of the election.

It has a number of times been held that a canvassing board has no authority to go behind the returns; that its duty is to canvass the vote as returned to it, and that, therefore, *mandamus* will lie to compel a canvass in accordance with the face of the returns. (*Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Neb., 104; *State v. Peacock*, 15 Neb., 442; *State v. Wilson*, 24 Neb., 139; *State v. McFadden*, 46 Neb., 668.) *State v. Jaynes*, 19 Neb., 161, was an application for a *mandamus* to compel the respond-

ent to turn over to the relator, books and papers belonging to the office of justice of the peace to which relator claimed he was elected. The respondent denied that the relator had been elected, although he had received a certificate of election, and alleged that illegal and fraudulent votes had been counted, by which the relator had been declared elected. The court held that in an application for a *mandamus* it would not go behind the certificate of election and try the relator's title, but would issue the writ in accordance with the certificate. This doctrine was reaffirmed in *State v. Dodson*, 21 Neb., 218, and though the nature of the cases was somewhat different in *State v. Van Camp*, 36 Neb., 91, and in *State v. Plambeck*, 36 Neb., 401.

From a review of the cases we therefore find that the court has steadfastly refused on application for a *mandamus* to inquire into the regularity of an election and into the correctness of the action of the election officers. It has never tried, but has always refused to try, issues of fraud and illegal voting. In the earlier cases it held that presenting such an issue was a sufficient reason for refusing the writ, without trying the issues, until the validity of the election should be determined in a proper action. Later, the ground was taken that a canvassing board must canvass the returns and declare the result according to the face of the returns; and this led logically to the conclusion reached in all cases since 1886, that an answer alleging fraud and illegality in the manner of conducting the election sets up no defense, thus in effect overruling the earlier cases, not so far as they held that such issues would not be tried in the *mandamus* case, but in so far as they held that presenting such issues was a defense to the action. We conceive that the later, and undoubtedly the correct position is that a canvassing board must proceed according to the face of the returns, and that the court will give its aid through a writ of *mandamus* to the person entitled under such a canvass, either to secure his certificate or to

secure the office in pursuance thereof, not as a final determination of the right, but to give effect to the result of the canvass as establishing a *prima facie* right. This must hold true as well in regard to the choice of a county seat as to the choice of an officer.

It is argued that in *Thomas v. Franklin*, 42 Neb., 310, this court held that no jurisdiction was obtained of contest proceedings in regard to this very election; that no contest being permissible, the respondents are without a remedy unless they can obtain it in this action, and that the usual remedy not being applicable, the merits of the election can be inquired into in this case. Assuming the premises to be correct, we would not at this time commit ourselves to the correctness of the conclusion. Some courts of very high authority have held that in such a case inquiry may be made into the issues presented by these answers. On the contrary, there are many cases emanating from courts to whose decisions we owe equal deference, to the effect that a proceeding which is in its nature, whatever may be its form, the contest of an election, is one political or administrative in its character, and not the subject of judicial cognizance unless made so by express statute; that, therefore, where there is no statute authorizing a judicial inquiry into the validity of an election, no such inquiry can be made in any proceeding, and this view is not without some inferential support from this court. (*Miller v. Wheeler*, 33 Neb., 765; *State v. Oleson*, 15 Neb., 247; *State v. Saline County*, 18 Neb., 422.) But the question thus presented it is not necessary to here decide. The statutes expressly provide (Compiled Statutes, ch. 26, sec. 64) that an election for the location or relocation of a county seat may be contested, and we did not in *Thomas v. Franklin* decide either that this statute was unconstitutional or that it was inoperative for failure to provide a method of contest. What we there decided was that an elector, as such, in his own individual name and behalf could not maintain

such a proceeding. The court did not undertake to decide how such a proceeding should be brought, because that question was not presented. The court held that Thomas, as an elector, by himself and in his own behalf, could not maintain it; but it does not follow from that holding that no contest could have been had by proper proceedings. Therefore, assuming that the question is a judicial one, and that fraud and illegality in an election present a case where the courts must in some manner of action afford a remedy, it does not follow that it may be by *mandamus*, and every adjudication is against such a view.

The motion to strike was filed July 19, 1895. On July 22 the relator filed what is styled an answer to the petition of the intervenors. It is now claimed that having answered, the motion cannot be considered. On June 22 the court had made an order requiring the relator to answer the petition of the intervenors within thirty days. The court, after making this order, almost immediately adjourned *sine die*. The answer, protesting that the petitions are irrelevant, is expressly made because of the court's order. Ordinarily, filing an answer to a petition waives any defect which can be raised only by motion, but in view of the fact that the court here in terms required such an answer, of the further fact that a consideration of the motion avoids the unnecessary delay and expense which would be caused by taking a large volume of testimony on the irrelevant issues, and still further, because the pleading filed by the relator was an answer to the petition of intervention, and not a reply to the answers of the intervenors which the motion attacks, we have deemed a decision upon the merits of the motion proper. It follows from what has been said that the motion is sustained.

MOTION SUSTAINED.

SUMNER DARNELL V. L. B. MACK.

FILED JANUARY 9, 1896. No. 4911.

1. **Fraudulent Conveyances: POSSESSION OF MORTGAGED CHATTELS: BURDEN OF PROOF.** In a contest between a chattel mortgagee and one representing a creditor of the mortgagor, the burden of proof is upon the mortgagee to establish the *bona fides* of the mortgage when he has not taken possession of the mortgaged property.
2. ———: ———: ———. This burden is not satisfied merely by showing that there were notes in existence, such as those described in the mortgage as secured thereby, without proof of the consideration of the notes or *bona fides* of the debt represented thereby.
3. **Attachment: LEVY: JURISDICTION.** Where property has been seized under a writ of attachment regularly issued and levied the court acquires jurisdiction over the property, so far at least as to render the custody of its officers lawful, and jurisdiction to that extent is not lost, so long as the action remains pending, by failure to serve process in the main action upon the defendant. Following *Crowell v. Johnson*, 2 Neb., 146; again overruling *Wescott v. Archer*, 12 Neb., 345.

ERROR from the district court of Butler county. Tried below before POST, J.

Evans & Hale and Steele Brothers, for plaintiff in error, cited: *Marsh v. Burley*, 13 Neb., 261; *Pyle v. Warren*, 2 Neb., 252; *Severance v. Leavitt*, 16 Neb., 439; *Bullis v. Drake*, 20 Neb., 171; *South Omaha Nat. Bank v. Chase*, 30 Neb., 444; *Norton v. Pilger*, 30 Neb., 860; *Gillilan v. Kendall*, 26 Neb., 82; *Edminster v. Higgins*, 6 Neb., 265; *Rhea v. Reynolds*, 12 Neb., 132.

I. T. McCaskey and George P. Sheesley, contra, cited: *Wescott v. Archer*, 12 Neb., 349; *Ruser v. Union Distillery Co.*, 24 N. Y. Sup., 101; *Rhode Island Hospital Trust Co. v. Keeney*, 48 N. W. Rep. [N. Dak.], 341.

IRVINE, C.

December 17, 1889, Thomas Wolfe commenced an action against Joseph Blahak and another, in the county court of Butler county, to recover the sum of \$282.60 on a promissory note. He caused an attachment to be issued against Joseph Blahak on the ground of a fraudulent removal and sale of the latter's property. The attachment was levied on certain corn as the property of Blahak. The summons in the case was January 5, 1890, returned "Not found," and down to the trial of the present action no further steps had been taken in the attachment case. February 15, 1890, Mack, the defendant in error, commenced the present action in replevin against Darnell, the sheriff, who held the corn under the writ of attachment. The case was tried in 1891 to the court without the intervention of a jury, and there was a finding and judgment for the plaintiff, from which the sheriff prosecutes error.

The plaintiff claimed the property by virtue of a chattel mortgage from Blahak. The defendant undertook to justify under the writ of attachment. The argument of the plaintiff in error is addressed largely to an attack upon the admission in evidence of the chattel mortgage relied upon by Mack. Under that assignment we can hardly consider the question presented, for the reason that in trials to the court without a jury errors in the admission of evidence are not, as such, open to review; but as Mack's claim was founded entirely upon the mortgage, the same questions are presented under the assignment that the finding is not sustained by the evidence. The evidence discloses that the corn in question was upon a farm recently in the possession of Blahak. About the time the attachment was issued, Blahak absconded. Mack testifies that he was proceeding to take possession of the corn when the attachment was levied; but nothing is shown to indicate that this proceeding had gone further than an instruction to Mack's agent to

Darnell v. Mack.

take possession. There is evidence conclusively showing that Blahak had himself left the farm, probably with the intention of not returning, but had left the corn there and servants of his were in charge. Therefore, Mack was not in possession of the mortgaged property when the writ of attachment was levied, and as against a creditor the burden of proof was upon him to show that his mortgage was taken in good faith. (*Pyle v. Warren*, 2 Neb., 241; *Marsh v. Burley*, 13 Neb., 261; *Paxton v. Smith*, 41 Neb., 56, and many other cases.) This burden he failed to satisfy by any evidence. There is testimony to show that the mortgage was given to secure two promissory notes from Blahak to Mack. But this much appears from the face of the mortgage itself. Mack himself testified by deposition, and it is nowhere shown what was the consideration of the notes, that there was any consideration, or that they represented any indebtedness. Surely the good faith of the mortgage is not established merely by showing without other evidence that notes are in existence similar to those described in the mortgage, without proof of the genuineness of the debt which the notes purport to represent, or other proof of good faith. It is, however, contended that in the absence of such proof the mortgage, which was due when the replevin suit was brought, was sufficient as between the parties thereto to give Mack the right of possession, and that proof of the mortgage made out his case, unless the sheriff established that he represented a creditor under valid process; and further, that there having been no service of process, either actual or constructive, upon the defendant in the attachment case the attachment was void, and the officer therefore showed no right against the plaintiff. We presume that the finding of the district court was based on this theory, and such a finding was warranted by the cases of *Wescott v. Archer*, 12 Neb., 345, and *Grebe v. Jones*, 15 Neb., 312. The course of decisions in this state has been somewhat peculiar, and calls for attention.

Crowell v. Johnson, 2 Neb., 146, was an action of ejectment, in which the plaintiff claimed by deed from one Dawley and the defendant by virtue of a sale made under a judgment in an action wherein the land had been attached as the property of Dawley. The court held that jurisdiction had been acquired by the levy of the order of attachment, and that a failure to publish notice, the defendant being a non-resident, while it rendered the proceeding voidable, did not render it void. The title under the judicial sale was, therefore, sustained. In *Wescott v. Archer*, *supra*, the facts were the same, and the form of action the same. The majority of the court, without referring in any way to *Crowell v. Johnson*, held directly to the contrary—that is, that the judgment was void because the published notice was defective. The chief defect in the notice was that it did not describe the property attached. Judge LAKE dissented. In *Grebe v. Jones*, *supra*, the court had rendered judgment in an action in which land had been attached, the defendants being non-residents, the published notice not properly describing the lands attached. The district court, on motion, set aside the judgment. From that order proceedings in error were prosecuted. The majority of the court, although that was a direct proceeding to vacate the judgment and not a collateral attack, held that the notice was sufficient, and overruled *Wescott v. Archer*, in so far as it held a specific description necessary, but took occasion to express its continued belief that notice was necessary to the jurisdiction of the court. Judge LAKE, while concurring in the result, again dissented from the reasoning of the court, and lamented “the struggle of the writer of that opinion to hold fast to a remnant of the pernicious rule announced in *Wescott v. Archer*.” A rehearing was at a subsequent term denied, Judge LAKE having then retired, the decision of the court being unanimous; but inasmuch as the same result would follow either from the views expressed in the majority opinion, or from the doc-

Darnell v. Mack.

trine of *Crowell v. Johnson*, and the views of Judge LAKE, overruling the motion for rehearing was not significant on the present question.

Under this state of decisions the first question which arises is as to whether the necessity of publication, in order to confer jurisdiction over attached property where the defendant has not been personally served, is a question still open for inquiry? We think it is. *Crowell v. Johnson* was decided by a united court evidently after a careful consideration of the authorities. *Wescott v. Archer* was decided chiefly upon a review of the case of *Paine v. Mooreland*, 15 O., 435, the court discussing and disapproving only one of the reasons given by the Ohio court for its judgment, and upon a citation of *Millar v. Babcock*, 29 Mich., 526, *Anderson v. Coburn*, 27 Wis., 558, and *King v. Harrington*, 14 Mich., 532. Of these cases *King v. Harrington* is the only one which lends any support to the conclusion of the court, the other two cases merely construing statutes quite different from ours. The fact that Judge LAKE dissented and cited *Crowell v. Johnson*, weakened the authority of *Wescott v. Archer* at the start; and the fact that in *Grebe v. Jones* the court retired from its position in *Wescott v. Archer*, and expressly overruled it in a material point, still further discredited the case. We therefore think that the doctrine of *Wescott v. Archer* has not been definitively established, and that in view of the conflicting decisions of the court, an inquiry into the merits of the question is demanded at this time.

The precise question under consideration in *Crowell v. Johnson* and in *Wescott v. Archer* was not the legality of the original levy of attachment, but the validity of a sale made in pursuance of a judgment following such levy. For reasons hereafter stated we regard the two questions as inseparably connected, and think that we cannot decide the first without a consideration of the second. There has been much discussion of the second question, but we are

satisfied that the doubts arising thereupon have been created more by the theoretical views of text-writers than by the adjudicated cases. Judge Drake expressed himself without qualification in favor of the doctrine that so far as the attached property is concerned, jurisdiction attaches by virtue of the levy of a lawfully issued writ, but that a judgment without service of process upon or notice to the defendant is erroneous, although not void. (Drake, Attachment, secs. 436 *et seq.*) In a later work (Waples, Proceedings in Rem, secs. 593 *et seq.*) the position seems to be taken that by the levy of the writ the court obtains lawful custody of the attached property, but is without jurisdiction to proceed to judgment. In 1 Wade, Attachment, secs. 6, 44, 45, the distinction between jurisdiction so far as acquiring the lawful custody of the *res*, and jurisdiction for the purpose of rendering final judgment disposing of the *res*, is denied. The argument is largely in the form of a criticism of *Cooper v. Reynolds*, 10 Wall. [U. S.], 308. At the outset of that criticism Mr. Wade attributes to Mr. Justice Miller, as a part of the opinion in *Cooper v. Reynolds*, the following language: "When notice to the defendant by publication is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause." No such language was used by Mr. Justice Miller in *Cooper v. Reynolds*, but such language is found in Drake, Attachment, sec. 437, not as a quotation but as Judge Drake's summary of the result of the cases cited by him, of which *Cooper v. Reynolds* is not one. Again, in a foot-note to section 6 Mr. Wade says: "See Waples on Proceedings in Rem, secs. 594-596, where this distinction is freely criticised. Also dissenting opinion of Field, J., in *Cooper v. Reynolds*." But Judge Field wrote no dissenting opinion in *Cooper v. Reynolds*. He merely expressed his dissent without an opinion. Criticisms by text-writers upon a doctrine established by adjudicated cases

Darnell v. Mack.

serve little purpose, when, as here, they are so evidently made without even reading the cases criticised. In these days when voluminous text-books appear with such rapidity that care in their preparation can hardly be expected, opinions expressed in such works are hardly worth serious attention, except where, as in the present instance, they have introduced a serious doubt upon a point where the real authorities are in practical accord. In the two works cited, while the authors express opinions opposed to the authority of the court to proceed, they practically admit that the weight of authority is against their opinions, but hold that certain well considered cases support their views. Of the cases cited by them we find none which support the view that a judgment rendered in such proceeding is without jurisdiction so far as it affects the attached property, except *Haywood v. Collins*, 60 Ill., 328, and *King v. Harrington*, 14 Mich., 532. To these may be added *Wescott v. Archer*, *supra*. We will not burden the opinion by reviewing the other cases cited by them to show their inapplicability. Some of them were direct proceedings to reverse such a judgment, where the question was one not of jurisdiction but of error in the proceedings. Others were where such a judgment had been rendered in one state, the attached property exhausted, and action brought in another state on the judgment as if it were one *in personam*. Still others were under statutes which fixed a definite time within which, after the issuance or levy of the attachment, process must be served upon the defendant, with a provision for vacating the attachment if this were not done. A valuable case of this class, although not cited by the text-writers, is *Rhode Island Hospital Trust Co. v. Keeney*, 1 N. Dak., 411. On the other hand, we have in the first place *Cooper v. Reynolds*, *supra*, in which the supreme court of the United States, in an opinion by Mr. Justice Miller, clearly elucidated the peculiar character of actions accompanied by attachments, saying: "If the

defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." The court then proceeds to hold that jurisdiction depends upon the lawful seizure of the property and that subsequent defects may render the judgment erroneous but not void. To the same effect is *Paine v. Mooreland*, 15 O., 435; *In re Clark*, 3 Denio [N. Y.], 167; *Beech v. Abbott*, 6 Vt., 586; *Williams v. Stewart*, 3 Wis., 678; *Feild v. Dortch*, 34 Ark., 399; *Hardin v. Lee*, 51 Mo., 241. It is true, as stated by Mr. Wade in his criticism of *Cooper v. Reynolds*, that that case was based upon an attachment under the statutes of Tennessee, and that in a later case the supreme court of Tennessee expressed its opinion to the effect that the supreme court of the United States had wrongly construed its statutes (*Walker v. Cottrell*, 6 Bax. [Tenn.], 257); but the criticism of the Tennessee court is chiefly directed against another point of the decision in *Cooper v. Reynolds*, and, in any event, the question before us is not whether the supreme court of the United States construed the Tennessee statutes properly in view of the decisions of the Tennessee courts, but whether its construction was a proper one to be given in the first instance to such a statute.

Attachment is, it is true, in this state, a remedy merely ancillary to the personal action, where the defendant is within the jurisdiction of the court and lawfully summoned. At the same time, even in such cases, there is a distinction between personal jurisdiction so as to permit an adjudication of the principal action, and jurisdiction of

Darnell v. Mack.

the attached property for the purpose of placing it in the lawful custody of the court pending the main action. For the purpose of the attachment an action is commenced when a petition is filed and a summons issued with the *bona fide* intention that it shall be served (*Coffman v. Brandhoeff*, 33 Neb., 279), although jurisdiction of the person of the defendant had not been then obtained. In the case of a defendant beyond the jurisdiction of the court, the action is analogous to a proceeding *in rem*. Substituted service cannot confer personal jurisdiction, and although the requisites for such service be strictly pursued, jurisdiction attaches no further than to permit the court to subject the attached property to the satisfaction of any claim found due. If a judgment rendered in such a case, without substituted service upon the defendant, is erroneous merely, as we now hold, and not void, then it follows that the property is throughout in the lawful custody of the court, and that the sheriff's possession under the levy of the attachment remains lawful so long as the proceedings are pending. If, on the contrary, we should follow the doctrine of *Wescott v. Archer*, one of two courses must be taken. We must hold either that because of the failure of the plaintiff to take proper steps to obtain substituted service, all the proceedings became void, and that the sheriff was, as was charged of the Six Carpenters, a trespasser *ab initio*, or else that jurisdiction attached on the levy of the writ and his custody was then lawful, and that it was lost at some point pending the proceedings. The first course would be as unreasonable as it would be unjust and impracticable. The sheriff, when he receives a valid writ of attachment, is bound to levy it. We cannot permit him to inquire then for his own protection whether the plaintiff will properly proceed with the subsequent stages of the case. We cannot subject him to liability for performing his clear duty; because the plaintiff, entirely independent of his control, neglects such subsequent steps. Nor do we think that the

second course is open. If the writ levied before process served is valid, and if a judgment rendered in pursuance of such levy without process is absolutely void, there must be some point between levy and judgment at which jurisdiction is lost, and where it becomes the duty of the sheriff without an order of the court to surrender the attached property. Our statutes provide for no such procedure, and we know no possible way in which the court can determine the point down to which jurisdiction over the attached property extends and after which it is lost, unless we say that jurisdiction attaches for a reasonable time to permit the plaintiff to publish notice. How is such reasonable time to be determined? An attachment is allowed (Code, sec. 198), not only when the defendant is a non-resident of the state, or has absconded or left the county to avoid service of summons, but also where he conceals himself so that a summons cannot be served upon him, and in such cases (Code, sec. 77), service may be had by publication. There may be many actions aided by attachment where the plaintiff is not only justified, but required, if he have a due regard for his oath, to make investigations after the commencement of the action to ascertain the whereabouts of the defendant, and in such cases the law never contemplated that the continuance of the court's jurisdiction should depend upon the hour or the day when the plaintiff elected between actual and constructive service and proceeded to have process executed. There is in such case a plain remedy always open where property is unreasonably detained in custody without taking steps to authorize a final adjudication. The court in such case may, on the motion of an interested party, or on its own motion, dismiss the case for want of prosecution, and with the dismissal of the case there is no doubt that the attachment would fall with it, and further jurisdiction over the attached property cease. In the case before us no defect is pointed out in the institution of the suit, or the issuance or levy of the writ of attachment. While it had

Union P. R. Co. v. Ray.

not proceeded to judgment, there was uncontradicted proof of an indebtedness to the attachment plaintiff on the cause of action alleged. We hold, therefore, that the sheriff was lawfully entitled to possession as against the plaintiff, unless the plaintiff established the *bona fides* of his mortgage.

REVERSED AND REMANDED.

Post, C. J., not sitting.

UNION PACIFIC RAILWAY COMPANY V. LAWRENCE RAY.

FILED JANUARY 9, 1896. No. 5856.

1. **Railroad Companies: NEGLIGENCE IN SETTING OUT FIRE: DAMAGES.** In an action against a railroad company for negligently setting out a fire, destroying plaintiff's property, the evidence, without contradiction, showed that a certain engine of the railroad company which passed the place where the fire originated, at such a time that it might have set out the fire, was equipped with the most approved appliances, and was in good condition, but there was no direct evidence that this engine did set out the fire, and there was evidence that it was set out by a different engine. *Held*, That the issue of negligence in the construction and maintenance of the engine setting out the fire was properly submitted to the jury.
2. ———: ———: ———: **INSTRUCTIONS.** Certain instructions, presenting no new question of law, construed, and *held* applicable to the evidence.
3. ———: ———: **DUTY OF LAND-OWNER TO PROTECT HIS PROPERTY.** The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land, nor to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad company. One is only required to take such precautions as a person of reasonable prudence would take to protect his property. (*Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 105.)
4. **Damages: INTEREST: NEGLIGENCE.** Where property is de-

stroyed by the negligence of another, the owner will be entitled to interest on the value of the property from the time of its destruction. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138.)

ERROR from the district court of Merrick county. Tried below before SULLIVAN, J.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

John C. Martin, contra.

IRVINE, C.

Ray recovered a judgment against the railway company for damages caused by the destruction by fire of certain hay lying in winrows on the land of Ray, it being claimed that the fire originated on the right of way of the railway and then spread to the plaintiff's land. The plaintiff alleged as negligence, first, that the railway company negligently failed to keep its right of way free from combustible materials, and suffered large quantities of dry grass and weeds to accumulate thereon; and second, that the railway company negligently permitted its engines to cast out sparks and coals of fire into said combustible materials. The court submitted to the jury both issues of negligence.

It is first contended by the railway company that there was no evidence upon which to submit to the jury the issue as to whether sparks and coals had been negligently permitted to escape from the engine. This contention is based upon the argument that the uncontradicted evidence shows that the engine which set out the fire had the most approved appliances to prevent such results; that it had been recently inspected and found to be in good condition, and that it was inspected when it reached the roundhouse after the run during which the fire was caused and was again found to be in perfect condition. We need not consider

whether under such a state of evidence this issue should have been withdrawn from the jury, because while the uncontradicted evidence does establish such a state of facts with regard to a certain engine which passed the place where the fire broke out about the time when the fire was discovered, there is no evidence to show that this was in fact the engine which set out the fire. On the contrary, the proof is that this engine was hauling a freight train, while the plaintiff's evidence is to the effect that the fire was set out by an engine hauling a passenger train. Of course, the witness who testified to this may have been mistaken as to this fact, but there is not a particle of evidence to show that he was, or that the engine described by defendants' witnesses was in fact the one which set out the fire. There is proof that the fire was set out by one of the defendant's engines, and under the long established rule, this being proved, the burden was upon the defendant to show due care in the construction, maintenance, and operation of that engine. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268; *Union P. R. Co. v. Keller*, 36 Neb., 189.)

It is next argued that the court erred in giving the following instruction: "If you find from the evidence that the defendant negligently and carelessly permitted dry grass, weeds, and other combustible materials to accumulate on its right of way adjoining the plaintiff's premises so as to unnecessarily increase the hazard from fire, and that by reason of such accumulation of combustible materials fire escaping from defendant's engine was kindled therein and thence communicated to plaintiff's property which was thereby destroyed, without the negligence of the plaintiff in any manner contributing thereto, you should find for the plaintiff, even though the escape of the fire from such engine was without any fault on defendant's part." The correctness of the general principle stated in this instruction is established by *Burlington & M. R. R. Co. v. Westover*, *supra*, and was again recognized in *Omaha Fair &*

Exposition Association v. Missouri P. R. Co., 42 Neb., 105.

No objection is made to the instruction in its general scope, but it is argued that the instruction was inaccurate in referring to the right of way as adjoining plaintiff's premises, the proof showing that there was a strip of land forty or fifty feet wide between the right of way and plaintiff's land. It is contended that the effect of using this term was to lead the jury to believe that it was the duty of the railway company to keep this strip, as well as its own right of way, free from combustible materials. If this were the effect of the instruction, it would, no doubt, be erroneous; but we do not think that it is possibly susceptible of that interpretation. It plainly refers to the right of way alone, and not to any other land. A further argument is interwoven with the last, to the effect that the instruction required the railway company absolutely to keep the whole of its right of way clear and free from combustible materials, while the law requires only that so much of it should be kept clear as is reasonably necessary to avoid danger from fire. This construction is also untenable. Under the instruction as given, the railway company was only chargeable if it negligently and carelessly permitted the accumulation of combustible materials in such a way as to unnecessarily increase the hazard from fire. Therefore, if the right of way was so wide that a failure to keep clear its outside border was not negligence, then the instruction would not render the company liable. The duty of the railway company in this behalf was further defined and explained by another instruction. Incidentally to the criticism of this instruction, it is also argued that the evidence showed without contradiction that proper precautions had been taken in this respect, and that this state of the evidence did not justify a submission of the question to the jury. This argument involves no question of law, and it would, therefore, be useless to state the evidence. We think there was sufficient to require a submission of the issue to the jury.

Objection is also made to the following instruction: "If at the time the property in question was destroyed, the defendant's right of way at the place where the fire started, if it started on the right of way, was free and clear from dry grass, weeds, and other combustible materials, or, if the defendant, its agents and servants exercised due and reasonable diligence, care, and precaution to keep and have its said right of way free and clear from such dry grass, weeds, and other combustible materials, then, in that case, the defendant would not be liable in this action on the second ground above mentioned." The principal objection to this instruction is the same urged against that already discussed, and it is as free from objection on that ground as the former instruction. But it is also argued that inasmuch as the court told the jury that the defendant would not be liable if the right of way was clear, or if reasonable diligence had been exercised to keep it clear, it was a necessary inference that the defendant would be liable if either fact did not exist. The effect of the instruction was directly contrary. It stated rules discharging the company, and stated them in the alternative. The inference would, therefore, be that in order to charge the company, the jury must find that the right of way was not clear, and, further, that the company had not exercised due diligence to keep it clear.

It is contended that the plaintiff was guilty of contributory negligence, and was, therefore, not entitled to recover. By the instruction first quoted, the jury was broadly told that the plaintiff must not have been guilty of negligence contributing to injury. The issue of contributory negligence was, therefore, submitted to the jury. We think that under the evidence it would not have been erroneous to have charged the jury that there was no contributory negligence. Certainly none was shown, unless it was negligent for the plaintiff to permit his hay to lie on the land. In *Omaha Fair & Exposition Association v. Missouri P. R.*

Co., supra, it was said that the construction of a railroad near one's premises does not require one to forbear the ordinary use of his land; nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad; that he is required to take only such precautions as a person of reasonable prudence under similar circumstances would take to prevent the destruction of his property. The land was hay land, and for hay to lie upon it in winrows was only to use it in the ordinary manner. It is not shown that there was anything negligent in the manner of using the land or storing the hay. It is argued that while the evidence shows that a fire-break had been plowed around the land, it was insufficient. But in this respect again the case is closely analogous to the *Burlington & M. R. R. Co. v. Westover, supra*, where the court held that it was not *per se* contributory negligence to fail to provide such fire-break.

Finally, it is contended that the court erred in directing the jury, if it found for the plaintiff, to allow interest on the value of the hay from the time of its destruction; but this rule of damages was precisely that stated in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, to-wit: "Where property is destroyed by the negligence of another, the owner will be entitled to interest on the value of such property from the time of its destruction."

There is no error in the record.

JUDGMENT AFFIRMED.

ADDISON E. CADY, APPELLANT, V. SOUTH OMAHA
NATIONAL BANK, APPELLEE.

FILED JANUARY 21, 1896. No. 6173.

1. **Trust Funds: BANK DEPOSITS.** Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account.
2. ———: ———. So long as such funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust.
3. **Commission Merchants: BANK DEPOSITS: ACCOUNTING: LIABILITY OF BANK.** F., a commission merchant, deposited in bank money realized from the sale of livestock consigned to him by C., his account with the bank being at the time largely overdrawn. *Held*, Regardless of the question of notice, that the bank is accountable to C., and that it cannot apply the money so deposited in satisfaction of F.'s indebtedness.
4. ———: ———: **EVIDENCE: PLEADING.** In an action against a bank for money deposited by the plaintiff's agent to his own account, evidence of payment by the defendant on checks subsequently drawn by such agent, in good faith, relying upon his apparent title to said fund, is inadmissible under a general denial. Such fact to be available as a defense must be specially pleaded.

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

See opinion for statement of the case.

John C. Watson and *Frank T. Ransom*, for appellant,
cited: *Gillespie v. Union Stock Yards Nat. Bank*, 41 Fed.
Rep., 231, 137 U. S., 411.

Charles Offutt, contra:

The bank did all that could be required of it in reference to the drafts. Had the bank paid the drafts con-

Cady v. South Omaha Nat. Bank.

trary to the orders of Fitch, it would have been liable to him. (*Marzetti v. Williams*, 1 B. & Ad. [Eng.], 415; *Patterson v. Marine Nat. Bank*, 18 Atl. Rep. [Pa.], 632; *First Nat. Bank v. Mason*, 95 Pa. St., 113; *Fonner v. Smith*, 31 Neb., 107; *Martin v. Rocke*, 53 L. T. n. s. [Eng.], 946; *Levy v. Cavanagh*, 2 Bosw. [N. Y.], 100; *Wood v. Boylston Nat. Bank*, 129 Mass., 358; *Justh v. Nat. Bank of the Commonwealth*, 56 N. Y., 478; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y., 434; *Thomson v. Clydesdale Bank*, 48 Albany L. J. [Eng.], 324.)

POST, C. J.

This is an equitable proceeding instituted by the appellant, Addison E. Cady, in the district court for Douglas county, against the appellee, the South Omaha National Bank, to enforce an accounting by the latter for the proceeds of a car load of hogs, by the plaintiff consigned to William Fitch at South Omaha under the name and style of William Fitch & Co. The facts essential to an understanding of the questions involved are as follows:

On the 20th day of June, 1888, the First National Bank of St. Paul, Nebraska, of which the appellant was president, addressed to the appellee the following communication:

"ST. PAUL, NEB., June 20, 1888.

"*H. C. Bostwick, Cash., So. Omaha*—SIR: Will you give me, in confidence, what information you may have regarding financial standing and responsibility of Wm. Fitch & Co., commission firm. We are sending you a good many drafts on them and would like to know something of them, and would consider it a special favor if at any time you consider them at all shaky, you would notify us, and we will be glad to reciprocate at any time.

"Yours truly,

GEO. E. LEAN,

"Cashier."

Cady v. South Omaha Nat. Bank.

To the above, appellee replied, under date of June 21, as follows:

"DEAR SIR: Replying to yours of 6/20, Wm. Fitch is doing a small commission business under name of Wm. Fitch & Co. We have been doing business with him a long time and think him reliable and conservative. I think he has about \$2,000 in his business, which is as much cash capital as larger firms use. We do not think him in any way shaky, and will inform you if we have reason to change our opinion."

H. C. BOSTWICK,

"Cashier."

Fitch was, as may be inferred, at the date mentioned, engaged in the live stock commission business at South Omaha, and in which he continued up to and subsequent to the transactions out of which this controversy arose. On the 24th day of September, 1888, appellant, at Dannebrog, in this state, shipped a car load of hogs to South Omaha, consigned to Fitch in the name of Wm. Fitch & Co. Said hogs were in due time received by the consignee named, who, on the 26th day of September, sold them to the Armour-Cudahy Packing Company for the sum of \$1,021.80. In accordance with the established practice, weight tickets were issued bearing the indorsement of the purchaser, directing payment of the amount of such purchase, which were by Fitch turned over to and collected by the appellee bank, the proceeds thereof being placed to the credit of the former on an open account, and which was, as will presently appear, then largely overdrawn. The plaintiff on September 25 drew upon Fitch & Co. for \$1,000, the estimated net proceeds of the shipment above mentioned, but which draft the appellee, by whom it was presented for payment, on September 27, returned unpaid, bearing the indorsement "amount not correct." It is conceded that the proceeds of the hogs sold, less necessary charges, including commission, amounted to the sum of \$976.01, and for which the appellant on the 28th day of September drew

upon Fitch & Co. The draft last mentioned was sent for collection to the appellee, and upon presentation payment thereof was refused. Fitch, according to the representative of the appellee bank, assigned as a reason for his refusal that the hogs in question had been purchased with money advanced by him for that purpose to one Stuart, and shipped in appellant's name in order to defraud him of the amount of his advancement, although that contention has no support whatever in the record.

Fitch's account with the bank shows a general balance in his favor until about August 10, 1888. Beginning with August 13, his account was overdrawn in various amounts, until the close of business September 25, when his indebtedness to the bank on his open account was \$976.44. During the month of August he was, according to the record, overdrawn fourteen days, in the average sum of \$591.01, the highest amount thereof being \$747.23 on the 4th and the lowest \$355.22 on the 22d. From September 1st to 25th, inclusive of both days he was overdrawn twenty days, in the average sum of \$1,276.69, the highest being \$1,757.94 on the 10th and the lowest \$585.54 on the 18th. The transactions on the 26th were the payment of two checks for \$5 each, drawn by Fitch, making a total on the debit side of \$986.44 and a credit for \$1,021.80, the proceeds of plaintiff's hogs, leaving a balance in his favor at the close of business on that day of \$35.36. Fitch was, it seems within the knowledge of the appellee, in the habit of making advancements to shippers and reimbursing himself from the proceeds of stock subsequently consigned to him, although it was aware that most, if not all, of his deposits represented the proceeds of stock sold on commission and for which he was accountable to consignors. It is also a reasonable inference from the admitted facts that appellee was advised not later than September 27, on which day the first mentioned draft was presented by it, that Fitch's credit of the preceding day was the pro-

Cady v. South Omaha Nat. Bank.

ceeds of stock sold for the appellant, and it is shown to have been fully informed of his rights in the premises on the 2d day of October following. As one of the questions presented involves an examination of Fitch's account with the bank from September 26 to October 2, inclusive, a summary thereof is here given :

	WM. FITCH & Co.	Dr.	Cr.
Sept. 26.	Balance		\$35 36
" 27.	Deposit		958 75
" 28.	Check	\$917 20	\$994 11
" " "		40 00	
" " "		5 00	
" 29.	Int. on Sept. overdraft...	10 50	
Oct. 1.	Check.....	5 00	
		<u>\$977 70</u>	
Oct. 2.	Balance.....		\$16 41

The questions suggested by the foregoing statement will be examined in the following order, viz.: (1.) To what extent, if at all, did the deposit of the appellant's money and its application in discharge of Fitch's indebtedness to the bank affect the rights of the former? (2.) Are the rights of the parties affected by the transactions between Fitch and the bank subsequent to September 26 and prior to the receipt of formal notice of the appellant's rights on the 2d day of October?

Preliminary to the first inquiry it should be remarked that the record presents no question of the authority of a factor or broker to deposit, in his own name, money, the proceeds of goods consigned for sale on account of his principal. We assume, therefore, that the act of Fitch, in depositing to his own credit the money realized from the sale of appellant's hogs, was authorized by the course of dealing between the parties named or by the recognized usage of trade,—in short, that such transaction did not in

law amount to conversion by Fitch of the funds in question. It is a recognized rule in equity jurisprudence that trust funds may be followed through any number of transmutations and reclaimed by the owner so long as they can be distinguished in the hands of the trustee or his assigns.

In the leading case of *Pennell v. Deffell*, 4 De G., M. & G. [Eng.], 372, the controversy was between an official assignee in bankruptcy and the executors of a prior deceased assignee who had kept a bank account in which he had mingled his own funds with those of the trust, the credits being all entered in his own name. It was said: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent* * * * as between the trustee and his executors and the general creditors after his death."

In *Van Alen v. American Nat. Bank*, 52 N. Y., 1, it was held that where an agent deposits in bank to his own account the money of his principal under the direction of the latter, such fund is impressed with a trust in favor of the owner which is not affected by the fact that the agent at the same time deposited to the same account funds of his own. Referring to the question of notice by the bank of the plaintiff's rights, the chief justice says: "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had title or not. That rests upon other facts. A notice to the bank might have prevented any transfer, or the creation of a lien by the de-

Cady v. South Omaha Nat. Bank.

positor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

In *Burnett v. First Nat. Bank of Corunna*, 38 Mich., 630, one Raynale deposited with the defendant bank to his own account the sum of \$1,015, the proceeds of certain securities belonging to the plaintiff's intestate. Of the amount so deposited, he subsequently checked out \$229.29 and soon thereafter died insolvent, being indebted to the bank in a sum exceeding the balance shown by the books thereof in his favor. Thereupon the bank, claiming the right to apply said balance upon Raynale's indebtedness, made upon its books the entries necessary to effectuate that result. In the opinion of the court, reversing the judgment below for the defendant, Graves, J., says: "But we are not aware of any principle which will enable a depositor, who has received from a trustee or agent a fund belonging in fact to the principal or beneficiary, to appropriate it by his sole act to his own debt held against the trustee or agent, and thereupon to insist that his want of knowledge of the true ownership is sufficient to guard such inequitable appropriation and bar the real owner from pursuing the fund."

In the recent case of *Davis v. Panhandle Nat. Bank*, 29 S. W. Rep. [Tex.], 926, the facts were quite similar to those involved in this controversy. There one Hancock, having in his possession a sum of money, the proceeds of certain live stock sold for the plaintiff, deposited it to his own credit with the defendant bank, with which his account was then overdrawn. In holding that the plaintiff was entitled to recover for so much of the deposit as was applied to balance Hancock's account the court say: "There is neither allegation nor evidence that the bank lost its debt upon Hancock by reason of this transaction, * * * and in the absence of such evidence we do not see upon what principle it should be allowed to retain this money."

The court in the case last cited say further: "As to whether or not it [the bank] should be protected in the amount it allowed Hancock to check out after its receipt, will depend upon the question of notice. If it had notice of the real ownership of the funds, and that Hancock was not authorized to use them at the time it honored his checks, it should be required to pay appellant notwithstanding such payments. If, however, it did not have notice of these facts, the money having been remitted to it in the name of Hancock, Davis should bear the loss."

In Boone, Law of Banking, sec. 285, the subject is considered in all of its phases, and concludes as follows: "It may be stated as a general principle, that if money deposited in a bank was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." And the same principle is recognized in the following cases: *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn., 75; *Peak v. Ellicott*, 30 Kan., 156; *Baker v. New York Nat. Exchange Bank*, 100 N. Y., 31; *Whitley v. Foy*, 6 Jones Eq. [N. Car.], 34; *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54; *Union Stock Yards Bank v. Gillespie*, 137 U. S., 411.

Analogous in principle, also, is the doctrine, abundantly supported by authority, that a partner cannot, without the consent of his copartners, apply the firm property in satisfaction of his individual liabilities, and that upon one so receiving partnership property is cast the burden of proving either consent by the other partners, or facts which amount to an equitable estoppel as against them. (*Kendal v. Wood*, 6 L. R., Ex. [Eng.], 243; *Heilbut v. Nevill*, 4 L. R., C. P. [Eng.], 354; *Rogers v. Batchelor*, 12 Pet. [U. S.], 221; *Davis v. Smith*, 27 Minn., 390; *Farwell v. St. Paul Trust Co.*, 45 Minn., 495; *Johnson v. McClary*, 131 Ind., 105. See, also, Parsons, Partnership, sec. 90, and note; Bates, Partnership, sec. 1046; *Dob v. Halsey*,

Cady v. South Omaha Nat. Bank.

16 Johns. [N. Y.], 34; *Mutual Nat. Bank v. Richardson*, 33 La. Ann., 1312.)

A consideration of the authorities cited leads irresistibly to the conclusion that appellant's right to the money in controversy was not affected by the deposit thereof in Fitch's name, and that he is entitled to reclaim it notwithstanding that fact, unless there exists in favor of the bank an equitable defense arising out of the subsequent transactions, which should prevail as against his title, a question we will now proceed to examine.

The allegations of the petition are indicated by the foregoing statement of facts, while the answer is, in effect, a general denial. It may, for the purpose of the present inquiry, be conceded that payment by the bank of the money in controversy upon Fitch's checks, in good faith, relying upon his apparent title thereto, without notice of appellant's rights in the premises, would be a complete justification,—in short, that appellant, having clothed Fitch with the apparent ownership of said fund, is now estopped as against the bank to question his authority to check it out. But is that fact available as a defense under the issues presented? "The answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; (2) a statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language." (Civil Code, sec. 99.) It has, in construing the section quoted, been repeatedly held that new matter of any kind, constituting a complete or partial defense, must be specially pleaded. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Clark v. Mullen*, 16 Neb., 481; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Bishop v. Stevens*, 31 Neb., 786; *Prall v. Peters*, 32 Neb., 832.) New matter, according to the most approved interpretation of the term, is any fact extrinsic to the matter alleged as the cause of action, and includes all defenses, whether legal or equi-

Thomas v. Carson.

table, not included in a denial of the allegations of the petition. (Bliss, Code Pleading, sec. 352.) And the rule thus stated is applicable to the case at bar, however the transaction in question may be characterized, whether as an estoppel *in pais*, or simply as a repayment of the appellant's money upon the checks of his authorized agent. It follows from these views that decree for the defendant must be reversed and the district court advised to enter a decree in accordance with the prayer of the petition.

REVERSED.

IRVINE, C., not sitting.

JOHN THOMAS, TRUSTEE, V. PETER N. CARSON ET AL.

FILED JANUARY 21, 1896. No. 6260.

1. **Pleading: NAMES OF PARTIES.** Where the petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," will be regarded as *descriptio personæ* merely.
2. **Abstracts of Title: STATUTORY BOND.** The bond required by section 1, chapter 64, Laws, 1887 (Compiled Statutes, sec. 65, ch. 73), is designed as security for those who may be damaged through the negligence or inefficiency, and possibly the fraud, of persons engaged in the business of compiling abstracts of title.
3. —: **ERRORS: LIABILITY OF ABSTRACTER.** T., the plaintiff, purchased a real estate mortgage relying upon the certificate accompanying an abstract of title, in which it was recited that C., the abstractor, had carefully examined the records of the office of the county clerk, the clerk of the district court, and county treasurer; and that there were of record in said offices no liens upon the property described except as in said abstract mentioned. *Held*, That C. is not liable on his bond on account of the omission from said abstract of a prior mortgage upon the property conveyed, then of record in the office of the *register of deeds*.

Thomas v. Carson.

4. ———: ———: CERTIFICATE OF ABSTRACTER: LIABILITY ASSUMED. The fact that the omission of the prior mortgage was the result of a conspiracy between C., the abstractor, E., the mortgagor, and P., to whom the subsequent mortgage was given, *held*, not material, since the certificate relied upon by the plaintiff imparted notice of C.'s engagement and the extent of the liability assumed by him.

ERROR from the district court of Adams county. Tried below before BEALL, J.

Capps & Stevens, for plaintiff in error.

John M. Ragan, J. B. Cessna, and M. A. Hartigan, contra.

Post, C. J.

This was an action in the district court for Adams county by the plaintiff in error Joseph Thomas, trustee, who sued to recover from the defendants Carson, Doyen, Spicknell, and Brunningsen, on the undertaking of the first named defendant as a bonded abstractor. The bond set out in the petition below is in substantial compliance with chapter 64, Laws, 1887 (Compiled Statutes, ch. 73, sec. 65 *et seq.*). The breach alleged as the cause of action is the making and certifying by Carson, the principal in said bond, of an abstract of the title to a certain quarter-section of land in Adams county, from which were omitted two mortgages shown by the records of said county, and which were valid and subsisting liens upon the property therein described. It is alleged that the plaintiff, relying upon said abstract and accompanying certificate, purchased a certain mortgage thereby appearing to be a first lien upon said property but which was filed for record subsequent to the recording of the two mortgages first described. That the mortgage so purchased by the plaintiff was not as shown by said abstract and certificate a first lien upon said property, but was, on the contrary, the third lien and no se-

Thomas v. Carson.

curity whatever for the money paid therefor. Carson, the principal, appears to be in default of answer, but the sureties join in an answer, of which the only allegation requiring notice is that the omission from the abstract of the two prior mortgages was the result of a conspiracy between Carson, their principal, the mortgagee therein named, the Western Loan & Investment Company, Elmore, who, at the date of the several transactions involved, held the legal title to the property in question, and Charles H. Paul, the mortgagee named in the subsequent mortgage, and was done without the knowledge or consent of the answering defendants, or any of them. The reply is a general denial of the allegations of the answer.

The foregoing statement omits many allegations of the pleadings, but is, it is believed, sufficient to illustrate the principles by which this controversy is governed. On the trial below the plaintiff having introduced his evidence in chief, the defendants requested the court to direct a verdict in their favor on the following grounds: 1. The plaintiff is without authority to bring or maintain the action. 2. The plaintiff is not the real party in interest. 3. The abstract and certificate mentioned in the pleadings are shown to be in all respects true. Said motion having been sustained, a verdict for the defendants was returned in accordance with the direction of the court, upon which judgment was subsequently entered, and which has been removed into this court for review by the plaintiff below.

The record contains no suggestion of the capacity in which the plaintiff sues, aside from his designation in the pleadings as "Trustee." The allegation with respect to the payment by him for the securities mentioned is as follows: "And in consideration of the delivery to this plaintiff of the \$10,500 notes secured by the mortgage hereinbefore referred to, this plaintiff purchased said notes, paying therefor the sum of \$10,500." Mr. Ratzell, who represented the plaintiff in the purchase of said securities,

Thomas v. Carson.

testified that the funds used for that purpose were advanced by Joseph Thomas, "Trustee," whose residence is in the state of Pennsylvania, but on his cross-examination stated that he had no information whatever as to whether said investment was made by Mr. Thomas on his own account or as the representative of another. We must, in view of these facts, regard the assumption that the action is prosecuted by the plaintiff in a representative capacity as unwarranted. On the contrary, assuming the petition to state a cause of action, it is in favor of the plaintiff individually, hence the word "trustee" accompanying his name in the pleadings is merely *descriptio personæ*. Where the petition or complaint discloses a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," may be treated as superfluous and wholly rejected by the court. (*Henshall v. Roberts*, 5 East [Eng.], 150; *Merritt v. Seaman*, 6 N. Y., 168; *Bennett v. Whitney*, 94 N. Y., 302; *Litchfield v. Flint*, 104 N. Y., 543; *Stilwell v. Carpenter*, 2 Abb. N. C. [N. Y.], 238, 62 N. Y., 639; *Holton v. Parker*, 13 Minn., 355; *Magee v. Board of Supervisors*, 38 Wis., 247; *Bragdon v. Harmon*, 69 Me., 29; *Sutton v. Mansfield*, 47 Conn., 388; 2 Boone, Code Pleading, p. 13.)

The conclusion thus stated renders necessary an examination of the third ground of the motion above mentioned, which is in effect that the veracity of the abstract and certificate introduced in evidence is not directly or indirectly assailed. However, as preliminary to an examination of that subject, it should be remarked that the act to which reference has been made requires each person engaged in the business of compiling abstracts of title to execute to the state of Nebraska a bond in the penal sum of \$10,000, with not less than three sureties, conditioned for the payment by such abstractor "of any and all damages that may accrue to any party or parties by reason of any error, deficiency, or mistake in any abstract or certificate of title

Thomas v. Carson.

made and issued by such person or persons." (Session Laws, 1887, p. 565, ch. 64, sec. 1.) On the back of the abstract in question we find printed a blank certificate in the usual form, in which it is recited that it is a full and complete abstract of all conveyances upon record affecting the property therein described. Carson, for reasons not disclosed by the record, instead of using the blank above mentioned, which included all conveyances affecting said property, executed and attached to the abstract a certificate in the following form:

"STATE OF NEBRASKA, }
ADAMS COUNTY. }

"I, P. N. Carson, an abstractor, duly qualified and having given the bond and had it approved as required by law, do hereby certify that I have carefully examined the records and files of the county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams and state of Nebraska, and that the foregoing abstract is true in all respects.

"And I further certify that there are no other deeds, mortgages, or trust deeds, other conveyances or contracts of any kind, or any other mechanics' liens, judgments, attachments, actions in equity, or other liens or proceedings, or any taxes upon, or any tax proceedings, or liens for taxes upon the premises described in the heading of this abstract, or any part thereof, upon or in the records of either of the said three offices, to-wit, county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams, except as hereinbefore set out.

"N. P. CARSON,

"Dated May 8, 1889.

Abstracter."

There are two facts conclusively established by the evidence in the record, viz.: (1) That the entries upon the abstract in question are in all respects true; (2) that at the date of said abstract, and for more than a year prior thereto, there was a register of deeds for Adams county, who is by

law made the custodian of all records of deeds, mortgages, and other instruments affecting the title to real estate in said county, and that the two prior mortgages above mentioned were not of record in either of the offices named in the foregoing certificate. It is also reasonably certain from the evidence that the omission from the abstract of the prior mortgages was, as alleged by defendant, the result of a conspiracy between Carson, Elsmore, Paul, the Western Loan & Investment Company, and others. It is possible that the terms "abstract" and "certificate of title" are used interchangeably in the statute, and that an abstracter would be chargeable upon his bond for damage resulting from the omission of a prior conveyance in the absence of any additional certificate; but it is unnecessary at this time to determine that question, since it is expressly charged by the plaintiff that he relied upon the certificate of Carson that there were no liens upon the mortgaged property except those shown by the abstract. Turning again to the certificate, it is apparent that by no reasonable or natural construction can it be held to include or apply to liens or conveyances of record in the office of the register of deeds. The evident purpose of the bond required by the statute is to provide security for persons who may be damaged through the negligence or inefficiency, and possibly the fraud, of abstracters. It is unnecessary to consider the question so ably argued by counsel for plaintiff, viz., whether Carson was, in contemplation of law, an officer, and his undertaking an official bond, or whether the requirement in that respect is a mere exercise of the power to regulate the business to which it applied. It is sufficient that the relation between an abstracter and his employer remains as it was before the statute, purely contractual, the only difference being, as already observed, that the bond of the former is a guaranty of his skill and faithfulness, and perhaps his fidelity. He may be, and frequently is, employed to search the record for liens only, or for deeds only, but in all cases his liability is

measured by his employment ; and where, as in this case, his engagement applies to particular records, his liability will not, by implication, be so extended as to embrace liens or conveyances not disclosed by a search of the designated office or offices. In other words, in order to maintain an action upon the statutory undertaking of an abstracter, it is necessary to show that the act of omission or commission alleged as the cause thereof is a breach of the conditions, express or implied, of the particular engagement to which it relates. The omission to which the plaintiff's loss is attributed not being, according to the record, a violation of the terms or conditions of Carson's employment as an abstracter, is not a breach of the bond upon which this action is found, and the district court did not, therefore, err in the direction complained of. We must not from these views be understood as intimating that the plaintiff is without remedy for the wrong alleged. It may be, and probably is, true that the purpose of Carson and his confederates above named was, by means of the certificate employed, to defraud purchasers of the subsequent mortgage through assignment from Paul, the mortgagee ; but, as has been shown, the prior mortgages were omitted from the abstract, with the knowledge and consent, if not by the procurement, of Paul, and the certificate was evidently satisfactory to him. The plaintiff may, therefore, as the victim of such fraud, in addition to the remedy against the parties antecedently liable on the notes and mortgage, pursue the several conspirators by an action for fraud ; but being a stranger to the agreement under which the abstract was furnished, and having purchased the notes and mortgage, relying upon the certificate, which of itself imparts notice of the limitation upon Carson's liability, he must look elsewhere for relief than to the bond declared upon in this action.

Defendants also rely upon a want of privity between the plaintiff and Carson, and argue that the abstract being sat-

Martin v. Miles.

isfactory to Paul, at whose instance it was prepared, and to whom the subsequent mortgage was given, cannot be made the basis of recovery in favor of a stranger to the transaction. The cases cited by counsel appear to sustain the proposition contended for as a rule of the common law, although their application to a statute like ours under which the bonds of abstracters are conditioned for the payment of "all damage that may accrue to any party or parties by reason," etc., may well be doubted. It is, however, unnecessary to pursue that subject, since, for reasons stated, the judgment must be

AFFIRMED.

RAGAN, C., not sitting.

LEROY MARTIN, APPELLEE, v. WILLIAM P. MILES,
APPELLANT.

FILED JANUARY 21, 1896. No. 7776.

Elections: MANNER OF MARKING BALLOTS. The provision of section 20, act of 1891 ("Australian Ballot Law"), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others; and such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter.

APPEAL from the district court of Cheyenne county.
Heard below before NEVILLE, J.

The opinion contains a statement of the case.

William P. Miles, George W. Heist, and Henry St. Rayner, for appellant:

The fifty-three ballots having no mark opposite the name

of appellee should not have been counted for him. (*State v. Stein*, 35 Neb., 859; *Spurgin v. Thompson*, 37 Neb., 39; *Grant v. McCallum*, 12 Can. L. J., 113; *Woodward v. Sarsons*, 32 L. T. R., n. s. [Eng.], 867; *Cameron v. MacLennan*, 11 Can. L. J., 163; *Dionne v. Gagnon*, 9 Queb. L. R., 20; *Haswell v. Stewart*, 1 C. S., 4th series [Scot.], 925; *Robertson v. Adamson*, 3 C. S., 4th series [Scot.], 978; *Parvin v. Wimberg*, 30 N. E. Rep. [Ind.], 790; Wigmore, Australian Ballot System, 191-193; *Hawkins v. Smith*, 8 Can. Sup. Ct., 676; *Sherwood v. State Board of Canvassers*, 129 N. Y., 409.)

Coffin & Stone, also for appellant.

H. D. Rhea, contra, cited: *State v. Russell*, 34 Neb., 116; *Kreitz v. Behrensmeyer*, 17 N. E. Rep. [Ill.], 232; *Daggett v. Hudson*, 54 Am. Rep. [O.], 832; *Kellogg v. Hickman*, 21 Pac. Rep. [Colo.], 325; *State v. Nicholson*, 102 N. Car., 465; *Brown v. McCollum*, 76 Ia., 479; *Fenton v. Scott*, 17 Ore., 189.

Post, C. J.

This case was before us on a former appeal, resulting in a reversal of the judgment of the district court for Cheyenne county, in favor of Martin, the contestant, for the office of county attorney for said county. (*Martin v. Miles*, 40 Neb., 135.) It will be observed from the opinion cited that the judgment of this court was based upon the ruling of the district court in receiving in evidence over the objection of the contestee, Miles, the original ballots cast at election in question, to-wit, the general election for the year 1892. It was there said, following *Albert v. Twohig*, 35 Neb., 563, that the ballots having been so placed that they might without difficulty have been tampered with by interested parties, were inadmissible in the absence of proof that they were in the same condition as when sealed up by

Martin v. Miles.

the several election boards. Since the remanding of the cause to the district court a trial has been had therein, resulting also in a judgment for the contestant, and from which the contestee has appealed to this court.

It is on this appeal strenuously insisted by counsel for Miles, the unsuccessful party below, that the proof is insufficient to overcome the presumption against the ballots and that the district court a second time erred in receiving them in evidence. We will not, however, examine that subject, but assume the objection to have been rightly overruled, since there is another question prominently mentioned in the briefs of the respective parties, which is necessarily decisive of the controversy.

According to the finding of the district court there were cast for Martin, the contestant, 503 votes, and for Miles, the contestee, 474 votes, or a majority of 29 in favor of the former. Counsel agree that the foregoing statement includes 53 ballots counted for the contestant, on which his name appeared written under the appropriate head, but containing no mark opposite his name, or any means of indicating the choice of the respective votes other than the writing of contestant's name, which, for reasons foreign to the question under discussion, was not printed on the official ballots. We think the ballots thus described should have been rejected. True, section 13 (Session Laws, 1891, p. 245, ch. 24) of the Australian ballot law, among other things, provides that "Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote for any office, and such vote shall be counted the same as if printed upon the ballot and marked by the voter." (Compiled Statutes, sec. 138, ch. 26.) The section from which the foregoing is quoted is apparently intended to define and provide for the furnishing of official ballots, and must be construed in connection with the other provisions of the act. Turning to section 20 (Session Laws, 1891, p. 251, ch. 24), which

prescribes the manner of voting, we observe the following language: "The elector shall then forthwith proceed alone into a compartment, if one be then unoccupied, and shall prepare his ballot by marking in the appropriate margin or place a cross (x) with ink opposite the name of the candidate of his choice for each office to be filled, or by filling in with ink the name of the candidate of his choice in the blank space provided therefor, and marking a cross (x) with ink opposite thereto." (Compiled Statutes, sec. 145, ch. 26.) Paragraph 7 of schedule B, entitled "Forms of Cards of Instruction for the Guidance of Voters," which is a part of said act, and required to be posted in all booths or compartments provided for marking ballots, reads as follows: "If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same." (Session Laws, 1891, p. 260, ch. 24.)

We are referred to the case of *State v. Russell*, 34 Neb., 116, in support of the contention that the provision for expressing the choice of the voter by a mark opposite the name of candidates is not essential to a fair election, and should therefore be regarded as directory only. But that case does not, we think, sustain the claim of counsel. It is, on the contrary, there said that "Courts have uniformly held that when the statute expressly, or by fair implication, declares an act to be essential to a fair election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive." It cannot be doubted from a reading of the several provisions of the Australian ballot law that the manner of voting therein prescribed, by a cross (x) or its equivalent, is exclusive of all others. Such appears to have been one of the principal inducements for the abolition of the former system in order to promote the express purpose of the act,

McCormal v. Redden.

viz., the independence of the voter. Adjudications directly in point are not numerous, but the views here expressed harmonize with the decided weight of judicial expression, if indeed there exists any diversity of opinion on the subject. (*State v. Stein*, 35 Neb., 848; *Sego v. Stoddard*, 36 N. E. Rep. [Ind.], 204; *Parvin v. Wimberg*, 30 N. E. Rep. [Ind.], 790; *Sanner v. Patton*, 40 N. E. Rep. [Ill.], 290; *In re the Vote Marks*, 17 R. I., 812; *Curran v. Clayton*, 86 Me., 42; *Vallier v. Brakke*, 64 N. W. Rep. [S. Dak.], 180, 64 N. W. Rep., 1119.)

Rejecting the 53 votes erroneously counted, the result is 450 votes for Martin and 477 for Miles, or a majority of 27 votes in favor of the latter. It follows that the judgment of the district court must be reversed and the cause remanded for trial *de novo*.

REVERSED.

HARRY MCCORMAL ET AL. V. STEPHEN A. REDDEN.

FILED JANUARY 21, 1896. No. 5958.

1. **Negotiable Instruments: CONSIDERATION: PRINCIPAL AND SURETY.** The maker of a promissory note died before its maturity, and gave by will to his two sons the major portion of his estate, both real and personal, subject to the payment of his debts. *Held*, The cancellation of the note, and the extension of time for payment of the indebtedness evidenced thereby, constituted a sufficient consideration for the execution and delivery by the sons of a note for the amount of such debt. The new note was a binding obligation upon them, and a party signing the first note as surety for the father and the second in the same capacity for the sons was entitled, upon being obliged to pay the same by their failure to meet it, to recover from the principal makers the sum paid, with legal interest.
2. ———: **ACTION BY SURETY AGAINST PRINCIPAL: JUDGMENT FOR PLAINTIFF.** The evidence examined, and *held* sufficient to sustain a verdict in favor of the plaintiff in the action.

3. **Instructions: REVIEW: ASSIGNMENTS OF ERROR.** "An assignment of error directed generally against a group of instructions is insufficient, and will be considered no further than to ascertain that any one of such instructions was properly given." (*Murphy v. Gould*, 40 Neb., 728.)
4. **Rulings on Evidence: REVIEW.** The objections to the admission of certain testimony considered and the ruling of the trial court thereon approved.

ERROR from the district court of Webster county. Tried below before BEALL, J.

The facts are stated in the opinion.

James McNeny, for plaintiffs in error:

The note sued upon was without consideration and void as to plaintiffs in error. A surety, in order to recover, must show that the principal at the time of payment was under legal obligation to pay. (*Kimble v. Cummins*, 3 Met. [Ky.], 327; *Davis v. Board of Commissioners of Stokes County*, 72 N. Car., 441; *Davis v. Board of Commissioners of Stokes County*, 74 N. Car., 374; *Pitt v. Purssord*, 8 M. & W. [Eng.], 538; *Hollinsbee v. Ritchey*, 49 Ind., 261; *Bancroft v. Abbott*, 3 Allen [Mass.], 524; *Noble v. Blount*, 77 Mo., 235.)

The court should have set aside the verdict as being against the weight of the evidence. (*Cummins v. Winters*, 19 Neb., 719.)

The last will and testament of Henry McCormal, deceased, was erroneously admitted in evidence. (*Brown v. Swineford*, 44 Wis., 292; *Webber v. Hanke*, 4 Mich., 198; *Marshall v. Haney*, 59 Am. Dec. [Md.], 92; *Cleveland Paper Co. v. Banks*, 15 Neb., 22.)

In any view of the case the plaintiff below was entitled to recover only the sum actually paid by him, with interest at seven per cent per annum from the date of payment, after giving defendants below credit with thirty-two dollars paid by them. The judgment exceeds the amount paid by

McCormal v. Redden.

plaintiff below, and interest, and to the extent of the excess is not sustained by the evidence. (*Bell v. Ardis*, 38 Mich., 609; *Beardsley v. Horton*, 3 Mich., 565.)

J. S. Gilham, contra.

HARRISON, J.

The defendant in error instituted this action in the district court of Webster county to recover the amount of a promissory note which he alleged, in his petition filed in the cause, was executed by the plaintiffs in error as principal makers and he as their surety, and which he further stated the plaintiffs in error failed and refused to pay at its maturity, and he as surety then paid. He was successful in the district court in a trial to the judge and a jury, and the defeated parties have presented the case to this court for review of the proceedings therein.

It is urged on behalf of plaintiffs in error that the note was, as to them, without consideration and hence of no effect, also that the verdict was not sustained by the evidence. These two contentions we will notice together, as, from the nature of the case, as disclosed by the evidence, they are so closely connected that it seems proper to do so. It appears, as we gather the history of the transactions involved in the cause from the testimony introduced at the trial, that at some time (the exact date is not material to the issue) in the spring of 1888, Henry McCormal, father of plaintiffs in error, borrowed of the bank of Guide Rock, Nebraska, the sum of \$325, as evidence of which he executed and delivered to the bank a promissory note, also signed by the defendant in error as surety. Before the maturity of this note Henry McCormal, the principal maker, died, and at the time the note became due demand was made of the defendant in error, the surety thereon, for its payment. Henry McCormal was, at the time of his death, the owner of a considerable estate, consisting of real and personal property, sub-

ject to some debts, which he by will devised and gave to his two sons, the plaintiffs in error, and which they received. The defendant in error, when the payment of the note signed by Henry McCormal and himself was demanded of him, went to the two sons, and, whatever the agreement or conversation between them at the time may have been, if any, they all of them, plaintiffs and defendant in error, subsequently signed the note in suit. The evidence was conflicting as to whether the three went to the bank together and signed the note while there, or went separately and signed. This is only material as it may be considered as bearing with more or less weight upon the question of the relation which existed between the signers of the note, whether defendant in error was surety or not. We are satisfied from a careful examination of the testimony that it will sustain findings that the plaintiffs in error realized, or knew at the time of the execution of the note in controversy, that the amount of the note given by their father and defendant in error to the bank was a valid claim against the estate of the deceased father, of which they were the recipients, and must be paid by them or deducted from the property, which would amount to the same. It was testified by defendant in error that when he asked one of the sons about arranging in regard to the note at the bank, the son said, "yes, they would have to pay it anyway in the end, and they would give their notes in its place;" that this was the reason which moved them to sign the note in suit; also that the three were at the bank together at the time they signed the note, and that the old note signed by the father and defendant in error was canceled and given to one of the sons at that time; that the new note was signed by defendant in error as surety, it being given to secure an extension of time for the payment of the indebtedness evidenced by the one which was canceled, the extension being to furnish time to plaintiffs in error to obtain a loan for which they were then negotiating, or in some manner raise

the money with which to pay the debt. These findings, being warranted by the testimony, coupled with admitted facts, and such as were fully proven, were sufficient to sustain the verdict, and disclosed sufficient consideration for the execution of the note.

It is argued that the trial court erred in giving instruction numbered 2 of the instructions given by the court on its own motion. The assignments in the motion for new trial and petition in error, in reference to the alleged error, were as follows: "The court erred in giving instructions numbered 1 and 2 on its own motion." It has been repeatedly held by this court that alleged errors in giving instructions should be separately assigned, or, if grouped, as in this case, and, by examination, any instruction of the group should be determined to be without error, the assignment would not be given further consideration. No. 1 of the instructions attacked by the assignment was entirely proper, and applying the rule above referred to, this contention will not be further noticed.

The last will and testament of Henry McCormal, deceased, father of plaintiffs in error, was offered and admitted in evidence over the objection of their counsel, and this is assigned for error. The instrument admitted disclosed that the greater portion of his property, both lands and personal property, subject to the payment of his debts, was given to these two sons, and was material as tending to show the interest plaintiffs in error would have in the payment of this note held by the bank, which would be a claim against the estate they were to receive, and be deducted from it, and thus tended to establish the consideration which moved them to sign the note in suit. Agreeably with this view of the will as evidence, there was no error in its admission. It is also claimed that counsel for defendant in error, during the argument of the case, made use of some expressions in reference to plaintiffs in error which were uncalled for, not warranted by the testimony, and prejudicial to the

rights of plaintiffs in error. Counsel for defendant in error, in the argument, if he is quoted correctly in the record, did use some language in the connection stated which probably might as well have been left unsaid, in so far as it may have been intended to bear upon any phase or issue of the case, but under the conclusion to which we have arrived as to the proper disposition of the rights of the parties in view of all the testimony adduced during the trial, the fact that this language was used by counsel was immaterial and in no degree prejudicial to the rights of plaintiffs in error.

The jury returned into court with a verdict, in which the amount allowed defendant in error was \$347.50, "with ten per cent interest per annum, less \$32 already paid by the defendant." This verdict was not accepted by the court, and the jury were directed to retire to the jury room and "bring in another verdict." These are the words used in the portion of the direction to the jury in relation to the verdict, as appears from the record. We presume the jury were told to reform the verdict by computing any interest to be allowed and add it to the principal, for this is what was done, as is apparent from the verdict which was delivered when the jury again came into the room, the amount assessed in favor of defendant in error, as then stated, being \$456. The only error which we can discover in this portion of the proceedings is in the amount allowed the defendant in error. The jury did not deduct the payment of \$32 and calculated the interest on the sum paid by the defendant in error at ten per cent per annum, instead of seven per cent, the proper per centum of interest. Treating the \$32 paid after the time of payment of the note by defendant in error as a payment on the interest properly allowable, the defendant in error was given a verdict for the sum of \$42.03 in excess of the amount to which he was entitled. Defendant in error will have leave to file a remittitur for the sum indicated, \$42.03, within forty days, and if he does

McEvoy v. Nebraska & Iowa Ins. Co.

so the judgment of the trial court will stand affirmed, and if not, reversed and remanded.

JUDGMENT ACCORDINGLY.

PATRICK MCEVOY V. NEBRASKA & IOWA INSURANCE
COMPANY.

FILED JANUARY 21, 1896. No. 5979.

1. **Insurance: PREMIUM NOTES: WAIVER OF DEFAULT.** A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity, is for the benefit of the company and may be waived by the insurer.
2. ———: ———: **ACTION ON NOTES: MEASURE OF RECOVERY.** A promissory note of date May 11, 1889, and due June 1, 1889, was executed and delivered by the party insured to an insurance company for the entire amount of the premium for a policy of fire insurance insuring his property for a stated term. The contract of insurance and the note each contained a statement by which it was agreed that, if the assured failed to pay the note at maturity, the liability of the company under the policy for any loss or damage to the property insured happening thereafter, and during the continuance of such default, should be suspended. Default was made in the payment of the note when due. In a suit on the note a recovery may be had for the full amount of it or any unpaid balance thereof.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

W. S. Poppleton, for plaintiff in error.

Montgomery & Hall, contra.

HARRISON, J.

This is an action for the balance due upon a promissory note of date May 11, 1889, and due June 1, 1889, in the

sum of \$225, given for the amount of the premiums for fire insurance issued and procured for the plaintiff in error by the Nebraska & Iowa Insurance Company, payee of the note. There had been payments made aggregating in amount \$97.50. The insurance company recovered judgment in the district court, and the case is presented to this court for review by error proceedings on behalf of the losing party there. It was a part of the insurance contract, and also stated in the note in suit, that if default was made in payment of the note when due, the company was absolved from liability during the continuance of such default, and the contract of insurance to be null and void during such time.

It is urged that the judgment was contrary to the evidence and to law, on the ground that there was no real consideration for the note because of the clause which we have hereinbefore indicated. A like contention was made in the case of *Phoenix Ins. Co. of Brooklyn v. Rollins*, decision reported in 44 Neb., 745, with which, in the effect of the facts and circumstances involved, the case at bar is identical, and, after a full discussion the rule was determined and announced as follows: "A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity, is for the benefit of the company and may be waived by the insurer. A fire insurance policy for the term of five years, at a gross premium for the entire time, the insured giving his note for such premium due in one year from date, contained a stipulation to the effect that the failure by the insured to pay the premium note when due suspended the policy during such default, but that a subsequent payment of the premium in full revived the policy for the remainder of the term. The defendant made default in the payment of such note, and in an action thereon it was held that the company was entitled to recover the full amount of the note." The case at bar is within the rule just

Hubermann v. Evans.

stated, and it follows that the plaintiff in error is liable for the full amount of the note or for any balance due upon it.

As a part of his answer to the petition or cause of action the plaintiff in error pleaded certain payments made upon the note after its maturity, and sought the recovery of the payments from the insurance company on the ground that the amounts were paid after the maturity of the note, and at a time when the plaintiff in error was not further liable for its payment either in whole or, in part. The non-liability as to these partial payments is based upon the same reasons as were urged as to non-liability for the whole amount, and having determined it to be unavailing in regard to the whole sum evidenced by the note, it is certainly so as to a part or parts of it, and there existed no right in the plaintiff in error to a recovery of the partial payments of the note made after its maturity. The judgment of the district court is

AFFIRMED.

ANNA C. HUBERMANN ET AL. V. MARY B. EVANS ET AL.

FILED JANUARY 21, 1896. No. 5731.

1. **Guardians' Sales: REGULARITY OF PROCEEDINGS: TITLE OF PURCHASER.** Defects and irregularities in the proceedings by a guardian for the sale of the real property of his ward will not affect the title of a good-faith purchaser, where so much as section 64, chapter 23, Compiled Statutes, makes essential to the validity of the sale has been complied with.
2. ———: ———: **JURISDICTION: DISTRICT COURT.** By "a district court of competent jurisdiction," in subdivision 1 of said section, is meant the district court of the county in which the guardian was appointed.
3. **Guardian and Ward: PETITION TO SELL LAND: DESCRIPTION OF PROPERTY.** A petition by a guardian for a license to sell the ward's real estate should describe all the land that the

ward owns, and especially that which is sought to be sold; but any description therein will be sufficient, when collaterally assailed, if it provides the means of identifying the property.

4. ———: ———: ———. In proceedings to sell the real estate of a ward, the description of the land need not necessarily be more specific, definite, and certain than is required in a conveyance of real property. Hence a general description of the premises in such petition, as all the real estate of the ward situate in this state, or in any particular county or city therein, is not void for indefiniteness and uncertainty.
5. ———: SALE OF LAND: REGULARITY OF PROCEEDINGS. The proceedings of a guardian to obtain authority to sell the land of his ward will not be invalidated by reason of a manifestly false statement in the description of the property in the application and license, when the remainder of the description, after rejecting that which is erroneous, is sufficiently certain to enable the land to be located.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Winfield S. Strawn, for plaintiffs in error.

Wharton & Baird and *B. G. Burbank*, *contra*.

NORVAL, J.

This is an action by plaintiffs in error to recover lot 4, in block U, in Lowe's Addition to the city of Omaha. Two other actions were brought in the court below by the plaintiffs against other defendants, to recover lots 5 and 6, in the same block. By consent, the three cases were tried together, and by stipulation of the respective parties it was agreed that the decision in one should control the others, since the facts in each case were the same. Upon a trial to the court judgment was entered herein against the plaintiffs. There is no controversy as to the facts. The parties claim title to the real estate in controversy through August Hubermann, deceased, as a common source. On the 15th day of December, 1878, August Hubermann died in Douglas

Hubermann v. Evans.

county, this state, intestate, seized in fee-simple of lots 7 and 11 in block S, lots 4, 5, and 6 in block U, and lots 1, 2, 3, 4, 5, and 6 in block V, all in Lowe's Addition to the city of Omaha. Hubermann left surviving him three minor children, the plaintiffs herein, and a widow. The latter was subsequently appointed, by the county court of said county, guardian of said minors, and qualified as such. The premises last above described were all the real estate situate in Douglas county which plaintiffs owned at the time the proceedings hereinafter mentioned for license to sell the lands of the wards were instituted. On March 20, 1884, the guardian filed in the district court of Douglas county the following duly verified petition for an order to sell the real estate of her wards:

"In the District Court of Douglas County, State of
Nebraska.

"IN THE MATTER OF GUARDIANSHIP }
OF ANNA C. HUBERMANN ET AL., }
MINORS. }

"Now comes Ellenor Hubermann, guardian herein of Anna C. Hubermann, Emma Hubermann, and Henry Hubermann, and shows to the court that said minors have no personal estate whatever or of any kind, and your petitioner is the mother of said minors, and she is a widow and without any means of support, except what she can earn by her own labor.

"Your petitioner further shows to the court that said minors are possessed of real estate situated in the county of Douglas, and state of Nebraska, and described as follows, to-wit: Lot seven (7) in block S, lot eleven (11) in block S, lots four (4), five (5), and six (6) in block W, and lots one (1), two (2), three (3), four (4), five (5), and six (6) in block V, all in Lowe's Addition to the city of Omaha.

"Your petitioner further states that the above is all the real estate belonging to said minors. She also states that there is a mortgage amounting with interest upon said real

estate to about the sum of \$1,500, and that said real estate is now worth about the sum of \$2,000.

"Your petitioner further alleges that said minors are in need of the proceeds of the sale of their said real estate for their support, maintenance, and schooling.

"Wherefore your petitioner prays that she be licensed to sell all the above described real estate, and that an order be made to her for that purpose by this honorable court, and for such other and further relief as in equity she is entitled to."

Notice of the presentation of the foregoing application was published for the period and in the manner provided by law, which notice contained no specific description of the property, but stated in general terms the object and prayer of the petition to be to secure a license to sell the real estate of the minors situated in Douglas county, Nebraska. Pursuant to said notice the district court entered an order or decree authorizing a sale of all the real estate described in the petition. The guardian, after taking and subscribing the oath required by law, and filing the statutory bond, which was approved, gave due and legal notice that she would, in obedience to said license, on the 28th day of November, 1885, at 10 o'clock in the forenoon of said day, sell the real estate of her wards, which notice stated the time, place and terms of sale, and described the real estate thus: "The following described real estate being and situated in Douglas county and state of Nebraska, to-wit: Lots 7 and 11 in block S, lots 4, 5, and 6 in block U, lots 1, 2, 3, 4, 5, and 6 in block V, all in Lowe's Addition to the city of Omaha." On the date last aforesaid, and pursuant to the terms of said notice, the guardian sold at public sale all the real estate last above described, including the lot in controversy herein, to Dexter L. Thomas, who was the highest bidder thereof, and who purchased in good faith and for a valuable consideration. Subsequently said sale was reported to, and con-

firmed by, the district court, and a deed was executed, acknowledged, and delivered by said guardian to said Thomas, covering the property so purchased by him, including said lot 4 in block U. The lots in block U were erroneously described as in block W in the petition of the guardian for license and in the license to sell. There is not now, and never has been, any block in Lowe's Addition to the city of Omaha known or designated as "block W." The defendant claims title to, and holds possession of, said lot 4 in block U under and through a series of valid conveyances from said Dexter L. Thomas. It is obvious that the plaintiffs are entitled to recover the premises in dispute, unless their title or interest therein was divested by the guardian's deed already mentioned. Whether it had that effect is the pivotal point in the case.

The legislature has, by sections 42 *et seq.* of chapter 23, Compiled Statutes, enumerated the purposes for which a guardian may sell the real estate of his ward, and prescribed the steps to be taken by the guardian in order to effect such sale, one of these being that the contemplated sale must be first licensed either by the district court of the county in which the guardian obtained his appointment, or by a judge of such court, and this, though the premises are located in another county. (*Stack v. Royce*, 34 Neb., 833.) There is no room to doubt that a sale by a guardian without such order is of no force whatever. It is not merely irregular, but is absolutely void. (*Ludlow v. Culbertson Park*, 4 O., 5; *Newcomb v. Smith*, 5 O., 448; *Goforth v. Longworth*, 4 O., 129; *Bell's Appeal*, 66 Pa. St., 498; *Evans v. Snyder*, 64 Mo., 516; *Walbridge v. Day*, 31 Ill., 379; *Tippett v. Mize*, 30 Tex., 361.) In the case before us a license was issued by the court of the proper county; but it is argued by counsel for plaintiffs that it and the application therefor were so defective as to render the guardian's deed nugatory. The objections to the proceedings instituted by the guardian to obtain the license which resulted

in the sale and conveyance of the property present the questions which have been discussed by counsel in the briefs and to be decided by the court. As this action is based upon the ground that no title to the premises in dispute passed to Thomas by the sale and conveyance made by the guardian, we look alone for defects of such a character as will render the proceedings void.

It is contended that the district court had no jurisdiction to license the sale of the lot, because it was not described in the petition presented by the guardian asking for authority to make the sale. It is strenuously argued by defendant's counsel that it is not essential that such a petition should contain any description of the real estate. We will proceed to the consideration of the point.

Sections 42, 43, 47, 48, and 53 of chapter 23, Compiled Statutes, are as follows:

"Sec. 42. When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall not be sufficient to maintain the ward and his family, or to educate the ward when a minor, or the children of such insane person or spendthrift, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein as provided in this chapter.

"Sec. 43. When it shall satisfactorily appear to the court, upon the petition of any such guardian, that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof put out at interest or invested in some productive stock, his guardian may sell the same for that purpose, upon obtaining a license therefor, and proceeding therein as hereinafter provided."

"Sec. 47. In order to obtain a license for such sale, the guardian shall present to the district court of the county in which he was appointed guardian a petition therefor, setting forth the condition of the estate of his ward, and

the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale, which petition shall be verified by the oath of the petitioner.

"Sec. 48. If it shall appear to the court from such petition that it is necessary or would be beneficial to the ward that such real estate or some part of it should be sold, the court shall thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before such court at a time and place therein to be specified, not less than four nor more than eight weeks from the time of making such order, to show cause why a license should not be granted for the sale of such estate."

"Sec. 53. If, after full examination, it shall appear to the court either that it is necessary or that it would be for the benefit of the ward that the real estate, or any part of it, should be sold, such court may grant a license therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or for the education of the ward or his children, or in order that the proceeds may be put out or invested as aforesaid."

Provisions are made in other sections of the chapter for notifying the next of kin of the ward and all parties interested in the estate of the time fixed for the hearing, that they may, if so advised, resist the application; also, for the guardian giving a bond and taking and subscribing an oath before the sale shall be made, and for the giving of a notice of the sale; but the sections relating to these matters need not be copied here, as they shed no light upon the question under consideration. The statute is explicit that a petition for a license to sell must be presented by the guardian, and clearly such petition is to be in writing. The statute likewise enumerates certain matters which the petition shall disclose, one of which being a statement of the facts relied upon to show the necessity and expediency of the sale of the ward's lands. In an action at law the petition should set forth the facts entitling the plaintiff to

recover; and so in a petition by a guardian for authority to sell real estate, the matters necessary to justify the granting of the license, and the sale thereunder, should be averred. The application must show that the ground upon which the sale is asked is one of the purposes specified by the legislature for which a sale may be licensed. The authorities do not agree as to the necessity of describing in the application the property sought to be sold. Some hold that it is essential, and that where a license is based upon a petition with the description omitted, the order and sale thereunder are void (*Leary v. Fletcher*, 1 Ired. [N. Car.], 259; *Docket v. Skinner*, 11 Ired. [N. Car.], 431; *Spruill v. Davenport*, 3 Jones Law [N. Car.], 42; *Verry v. McClellan*, 6 Gray [Mass.], 535; *Weed v. Edmonds*, 4 Ind., 468; *Trent v. Trent*, 24 Mo., 307; *Wilson v. Hastings*, 66 Cal., 243; *Gilchrist v. Shackelford*, 72 Ala., 7); and others say it is not essential that the property be particularly described in a petition for its sale (*Wells v. Mills*, 22 Tex., 302; *Wells v. Polk*, 36 Tex., 121; *Davis v. Touchstone*, 45 Tex., 491; *Bryan v. Bauder*, 23 Kan., 95); and there is another line of cases which holds that the omission of the description from the application for an order of sale, or that the petition is otherwise defective, is an error or irregularity merely, available alone in a direct proceeding to review the decision, but that the order allowed on such a petition is not void when assailed collaterally. Among the numerous decisions sustaining this doctrine are: *Burke v. Wheat*, 22 Kan., 722; *Hodgin v. Barton*, 23 Kan., 740; *Watts v. Cook*, 24 Kan., 278; *Arrowsmith v. Harmoning*, 42 O. St., 254; *Rumrill v. First Nat. Bank of St. Albans*, 28 Minn., 202; *Montour v. Purdy*, 11 Minn., 278; *Howard v. Moore*, 2 Mich., 226. Although our statute does not in express language say that the petition of a guardian for a license to sell the real estate of his ward must describe or set forth the property, we are constrained to hold that the manifest intention of the legislature was that the application should designate

Hubermann v. Evans.

the property belonging to the ward. This is obvious from the fact that by section 53, already quoted, the order or license must specify whether the whole or only a part of the property shall be sold, and further, that section 47 requires the petition to state the condition of the estate of the ward. Again, proceedings for the sale of real property by a guardian are necessarily *in rem*, and the application should show that the *res* is in the jurisdiction of the court granting the order. The authority of a guardian is confined to the state in which he was appointed, and, therefore, he cannot be empowered in this state to sell property situate in another state. The petition should, therefore, disclose that the real estate for which sale is prayed is within this state.

It will be observed that the petition or application for a license in the case under consideration does not specifically state that any of the real estate belonging to the wards was located in block U, in the particular block in which the lot in question is situate, and consequently it is argued that the court had no power to license the sale thereof. The defendant urges that the confirmation of the sale made by the guardian cured any and all defects, errors, and irregularities previously accruing in the proceedings, and that they are not available in this collateral action. Section 64, chapter 23, Compiled Statutes, is relied upon in support of the latter contention. It provides: "In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: First—That the guardian was licensed to make the sale by a district court of competent jurisdiction. Second—That he gave a bond, which was approved by the judge of the district court, in case any bond was required by the court upon granting the license. Third—That he

took the oath prescribed in this subdivision. Fourth—That he gave notice of the time and place of sale, as prescribed by law. Fifth—That the premises were sold accordingly, at public auction, and are held by one who purchased in good faith.”

Errors and irregularities in the proceedings instituted by a guardian for the sale of real estate, owned by his ward, are reviewable in an appropriate proceeding, but it by no means follows that the sale is void on account thereof. The section last quoted provides when a ward, or a person claiming a title under and through him, may contest the validity of a guardian's sale, and what shall be conclusively taken to be a valid sale, when attacked in a collateral action, like the one before us. It is not every defect, irregularity, or omission preceding the sale that will defeat the title of a good-faith purchaser; but only those enumerated in the statute. This is self-evident, since if every step laid down in the statute relating to the sale of real estate of those under guardianship must be strictly followed, to constitute a valid sale, then there never can be irregularities or defects to cure; and the enacting of section 64 was a useless piece of legislation. The legislature contemplated that mistakes and omissions would likely occur in such proceedings by the failure of the guardian to strictly follow each requirement of the statute; and the purpose of the law-givers in adopting the aforesaid section was to prevent a defeat of the sale on account of such defects and errors in the proceedings, when collaterally assailed, where it appears that the five requirements of said section have been complied with. In other words, the sale must stand as valid unless some one of the five grounds for which a sale may be avoided is made to appear; but if any one of the requisites prescribed in section 64 is lacking, the sale must fall; otherwise the purchaser acquires by the sale and deed a perfect title, whatever else is wanting. This is the plain import of the statute. Neither the failure to give notice

Hubermann v. Evans.

of the application for a license to sell, nor defects in a petition, will render the proceedings void under this curative section. The legislature could have dispensed with the giving of such notice, or with the presentation of any petition, and this being true, it could provide by statute, as it in effect has done, that sales shall be valid when made, where the petition is defective or entirely wanting, or where the notice of the application for the order is defective or entirely lacking, in case the matters specified in section 64 appear. (*McKeever v. Ball*, 71 Ind., 398.)

In the case before us, it is established beyond controversy that the guardian of these plaintiffs gave a bond as prescribed in the license, which was duly approved; that she took and subscribed the oath required by statute; that the lot in question was duly advertised and sold at public sale; and that the defendant is a good-faith purchaser of the premises. Therefore, the second, third, fourth, and fifth requirements of section 64 have been fully complied with.

It remains to be determined whether "the guardian was licensed to make the sale by a district court of competent jurisdiction," as required by the first subdivision of the section under consideration. The sale was authorized by an order entered by the district court of Douglas county, the county in which the guardian received her letters of guardianship. Was the license issued by a court of competent jurisdiction? We entertain no doubt of it. The words "competent jurisdiction," as used in the section, mean the court which has the power or authority conferred upon it by the law to hear and determine the particular application, and whose jurisdiction it was proper to invoke in that instance. The statute has expressly conferred the power upon the district court of the county where the guardian was appointed, or a judge of such court, to license the sale of real estate of the ward for certain specified purposes. Where a guardian of minors is appointed by the county court of Douglas county, the district court of no other

county in the state could lawfully order the sale of the real estate belonging to such minors, and should it do so, the order and sale thereunder would be absolutely void, and their invalidity could be asserted in a collateral proceeding. What the legislature intended was that the sale must have been authorized by the proper forum; *i. e.*, the district court of the county, wherein letters of guardianship were granted, or by the judge of such court. Orders of sale made or rendered by such court, or judge, upon applications for license to sell real estate by a guardian, cannot be impeached collaterally; because, however erroneous they may be, they are not void. A *bona fide* purchaser at a guardian's sale, under a license issued by a court of competent jurisdiction, is not bound to look beyond the license, but takes a good title which cannot be impeached collaterally, and is not affected by any irregularities in the proceedings except for the matters enumerated in said section 64. The construction we have placed upon said section is not without precedents to sustain it, but is abundantly supported by the following decisions pronounced under statutory provisions the same as ours: *Montour v. Purdy*, 11 Minn., 278; *Rumrill v. First Nat. Bank of St. Albans*, 28 Minn., 202; *Howard v. Moore*, 2 Mich., 226; *Coon v. Fry*, 6 Mich., 506; *Marvin v. Schilling*, 12 Mich., 356; *Woods v. Monroe*, 17 Mich., 238; *Cooper v. Robinson*, 2 Cush. [Mass.], 184; *Harris v. Lester*, 80 Ill., 307; *Reynolds v. Schmidt*, 20 Wis., 394; *Mohr v. Porter*, 8 N. W. Rep. [Wis.], 364; *Ackerson v. Orchard*, 7 Wash., 377; *Overton v. Cranford*, 7 Jones Law [N. Car.], 415.

But it is said the court never authorized the sale of the lot in suit. In the license granted, as well as in the petition therefor, this lot is not particularly mentioned or described. In the decretal order the court finds "that it is for the best interest of said minors that said real estate in said petition described should be sold, * * * and that the interest derived from the sale of said real estate should

be used for the maintenance and education of said minors," etc., and then orders that the "guardian proceed to sell at public auction to the highest bidder the real estate of said minors as in said petition described," following which, for the first time therein, is a specific description of the property, the same as contained in the application for license. It is obvious that, for the purpose of ascertaining what property was ordered sold, the petition and license must be construed together. As mentioned in our statement of the facts in the fore part of the opinion, the petition for an order of sale describes certain of the property for which sale was asked as located in block "W" in Lowe's addition to the city of Omaha, when there is no such block in that addition, instead of describing it as in block "U" in said addition, in which last block the lot in controversy is situate. It must be conceded, if there were nothing aside from the specific description of the property contained in the application or license to indicate the land asked and directed to be sold, that the sale of the lot in suit was never authorized, and the guardian's deed did not convey this lot. But there is inserted in the petition for license to sell, other descriptions or identifications of the lots which the court was requested to order sold. It was all the real estate belonging to the wards that was asked to be sold, and the same is described as being in Lowe's Addition to the city of Omaha. We then have a case where the petition for a license contains two inconsistent descriptions of the property,—the one general, and the other specific; the former true and the latter, in part, false and incapable of being applied to any tract of land. Two questions arise: First—Which description shall give way to the other? Second—If the false one shall be rejected, is the general description of the property sufficient to authorize the sale of the lot in dispute? We will take up the propositions in their inverse order.

The office of a description in a deed is not to identify

the lands conveyed, but to provide the means of identification; and it is sufficient when this is done. (*Works v. State*, 22 N. E. Rep. [Ind.], 127.) It must be conceded, we think,—for such is undoubtedly the law,—that the description of the property in the proceedings by a guardian for the sale of the lands of the ward, need not necessarily be more specific, definite and certain than is demanded in deeds or other conveyances of real property. A conveyance is not void for want of description, where an uncertainty as to the identity of the land conveyed can be explained by extrinsic proofs. (*Henry v. Whitaker*, 17 S. W. Rep. [Tex.], 509; *McWhirter v. Allen*, 20 S. W. Rep. [Tex.], 1007; *Perry v. Scott*, 109 N. Car., 374.) A deed simply describing in the granting clause all the grantor's lands in the state, or within a certain county or city, is not void for indefiniteness, but is a sufficient description, since it can be made certain by evidence *aliunde* of what lands the grantor at the time owned. (1 Dembitz, Land Titles, sec. 6; *Witt v. Harlan*, 66 Tex., 660; *Hervey v. Edens*, 6 S. W. Rep. [Tex.], 306; *Cox v. Hart*, 145 U. S., 376; *Frey v. Clifford*, 44 Cal., 335; *Brown v. Warren*, 16 Nev., 228; *Harris v. Broiles*, 22 S. W. Rep. [Tex.], 421; *Minor v. Lumpkin*, 29 S. W. Rep. [Tex.], 799; *Crowley v. Goll*, 27 S. W. Rep. [Tex.], 879.)

In the fifth subdivision of the syllabus in *Stanley v. Green*, 12 Cal., 148, it is said: "It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence." (See *Redd v. Murry*, 30 Pac. Rep. [Cal.], 132.)

It has been held that extrinsic evidence is admissible to locate lands conveyed by a sheriff's deed containing an accurate, but general, description of the premises. (*Smith v. Crosby*, 86 Tex., 15; *Brown v. Warren*, 16 Nev., 228.)

Ward v. Saunders, 6 Ired. [N. Car.], 382, was an action

of ejectment to recover lands purchased at an execution sale. The return of the officer on the writ described the premises thus: "Levied on the lands and tenements of Isham Doby, adjoining the land of Allen Newsom, Claiborne Newsom and others, and containing 190 acres." It was ruled that this was sufficient to distinguish and identify the lands, and complied with the statute which requires that the officer making the levy shall make return setting forth "what lands and tenements he has levied on, on what water-course, and whose land it is adjoining." To the same purport are the cases of *Smith v. Low*, 2 Ired. [N. Car.], 457; *Blanchard v. Blanchard*, 3 Ired. [N. Car.], 105.

In *Starling v. Blair*, 4 Bibb [Ky.], 288, Wilkinson gave to one M'Ilvain a mortgage upon "all the lots that he then owned in the town of Frankfort, whether he had a legal or equitable title thereto." The mortgage was foreclosed, and an order of sale was issued, under which lot 82, the one involved in that suit, was sold to Starling. In an action by Blair to specifically enforce a contract alleged to have been made by Wilkinson for the sale of the lot, it was contended the mortgage was invalid, on the ground that the description of the premises was too general and uncertain. The court held the description good for all the lots which could be identified as belonging to the mortgagors at the date of the mortgage; and in passing upon the question, in the opinion, say: "This objection is certainly novel in its nature. As far as we are aware it is unsupported by any authority, nor can we perceive any reason to justify it. The expression used, though general, is not uncertain. It clearly and explicitly manifests the intention of the parties, and there is nothing unlawful in that intention. There may indeed be more difficulty in ascertaining the lots intended to be conveyed, where the language used in describing them is thus general, than if the lots had been designated by their numbers. But it is in the degree and not in the nature of the difficulty that the two cases differ. It

results in neither case from no ambiguity on the face of the deed, but from extrinsic circumstances, and in both cases resort must be had to evidence *aliunde* for the purpose of identifying the lots which are the subject of the conveyance."

In *Davis v. Touchstone*, 45 Tex., 490, lands belonging to an estate were sold, on the petition of the administrator, by order of the probate court. In a suit in ejectment against the heirs, they set up that the premises were not sufficiently described in the order of sale or administrator's deed, the description being "a part of the headright league of land granted to Leander Harle, containing three hundred and twenty acres, being the tract on which the said James Touchstone lived at the time of his death, adjoining the lands of A. H. Davis, James Aikins, and William C. Easterwood." The description was held sufficient.

Robertson v. Johnson, 57 Tex., 62, was a suit by minors to recover certain real estate which had been sold by their guardian under an order by the probate court, the defendants claiming title to the land through such sale. The plaintiffs insisted that the order of sale was void, because of the insufficient description of the lands. The court in overruling the contention said: "An order of sale has been sustained in which no description was attempted to be given of the land ordered to be sold, or any mention by name, designation, or description of any particular tract of land. (*Wells v. Polk*, 36 Tex., 126.) In this case the order of sale empowered the guardian to sell at the court house door in the town of Paris, Lamar county, 'three hundred and twenty acres of land known as the headright of William H. Merrill,' etc. As was said by the present chief justice in *Davis v. Touchstone*, *supra*, 'the description in these orders is not such as should have been given, but it cannot be said to give no data for identification.' Here if, as recited in the order, the three hundred and twenty acres of land was known as the headright of William H. Merrill, it appears

that this would furnish affirmative matter by which the land might be identified. We do not think the order of the sale is void for a want of description of the property directed to be sold."

In *De Bardelaben v. Stoudenmire*, 48 Ala., 643, lands of a decedent were sold by order of the probate court on the application of the administrator of the deceased. The sale was attacked upon the ground of the insufficiency of the description of the property in the petition. There were two tracts mentioned in the petition, but the county and state where located were not given. One was described as a quarter section, but the number was not given, but was bounded on its four sides by lands of three persons named. The court held the description sufficient. We quote the fourth paragraph of the syllabus: "If the petition omits, in words, to state that the lands are in the county, or within the jurisdiction of the court in which the application is made, yet, if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of the sale is made."

Pendleton v. Trueblood, 3 Jones Law [N. Car.], 96, was an action of ejectment to recover lands of a ward, sold by his guardian, under an order of court. The order authorized the guardian "to sell the land of the ward named in the petition, adjoining the lands of John Bailey and others, containing about one hundred and ten acres." It was urged that this description was insufficient to divest the title of the ward. The court overruled the objection, saying: "It does not appear, and it is not suggested, that she had any other land in that locality, nor indeed anywhere else. Such a description would be sufficient to distinguish and identify lands levied on by a constable under a justice's execution; and we think it must be so in a case like the present."

In *Clements v. Henderson*, 4 Ga., 148, a description of

land in an order authorizing the administrator to sell "all the real estate" of the decedent was held sufficient.

In *Bloom v. Burdick*, 1 Hill [N. Y.], 130, a description in a license issued to an administrator to sell the property of his intestate, as "ninety-one acres of the southwest corner of lot number eleven" was held not to be fatally defective. The court, in passing upon the point, said: "The description would be best answered by laying out ninety-one acres in a square form on the southwest corner of the lot, which would not include more than forty acres of the land of the intestate, and would include about fifty acres of land belonging to some other person. But there is, I think, enough in the case to help the purchaser out of this difficulty. It was an order for the sale of the real estate of which Henry Bloom died seized, and there were to be ninety-one acres in a specified lot. The intestate owned precisely that quantity of land, and no more, in the designated lot, and his land touched the southwest corner of the lot, though it did not lie in a square form. The surrogate evidently had in view the particular parcel of land which the intestate owned in lot number eleven. The matter must have been well understood by all the parties in interest, and I think the whole of the land in controversy might well pass by the deed."

We have already stated that a description of the lands should be given in the application of a guardian for an order of sale. As in a conveyance of real estate, so in the proceedings by a guardian to obtain authority to sell the lands owned by his ward, it is far better that the property be specifically and accurately described, since it would obviate a resort to extrinsic evidence to determine the property affected by the court's order. But upon principle, as well as authority, if the description given, though general in its terms, is such as to leave no difficulty in identifying the premises intended, by the use of such means as would be admissible in a court of justice for that purpose, it will

Hubermann v. Evans.

be sufficient after confirmation of the sale. In this case, after eliminating from the application for license and order of sale the specific, yet uncertain and impossible, description of the property, we have remaining an application for license, and an order to sell all of the real estate of the plaintiffs. Under the authorities heretofore mentioned such general description is not void for uncertainty, but is ample to sustain the guardian's deed for the lot involved in this litigation.

We now pass to a consideration of the remaining proposition, namely: Can any portion of the specific description of the property contained in the application and license be rejected, or must the general description therein contained yield to the specific? It is a well established rule, in the construction of deeds or other instruments containing two descriptions of property, which are not consistent with each other, one false and the other true, that extrinsic evidence may be resorted to for the purpose of ascertaining which one is correct, and that the instrument or deed must be interpreted accordingly. This is but an application of the familiar maxim *falsa demonstratio non nocet*, sanctioned by all the authorities. In 2 Devlin, Deeds, sec. 1016, it is said: "If the deed contains two descriptions, one correct and the other false in fact, the latter should be rejected as surplusage. Where one of two different descriptions applies to land to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description and the latter will be rejected as false. 'If sufficient remains, after rejecting a part of the description which is false, the deed will take effect.'" The rule deducible from the authorities may be summarized thus: A deed will not be defeated by a manifest erroneous description therein of the property intended to be conveyed, when the remaining part of the description is sufficiently certain by the aid of proof *aliunde* to locate the land. (*Parks v. Loomis*, 6 Gray [Mass.], 467; *Bosworth v. Sturtevant*, 2 Cush.

[Mass.], 392; *Mason v. White*, 11 Barb. [N. Y.], 173; *Masten v. Olcott*, 101 N. Y., 152; *Roman Catholic Orphan Asylum v. Emmons*, 3 Brad. [N. Y.], 144; *Vose v. Handy*, 2 Greenl. [Me.], 322; *Harvey v. Mitchell*, 31 N. H., 575; *Thompson v. Ela*, 60 N. H., 562; *Benton v. McIntire*, 15 Atl. Rep. [N. H.], 413; *Wilt v. Cutler*, 38 Mich., 189.)

Although this opinion has already reached an unusual length, we feel that the importance of the question involved will justify our referring to, and making quotations from, a few of the leading cases where the identical principle here contended for by defendants has been judicially determined.

Moreland v. Brady, 8 Ore., 303, was an action to quiet title to lot 2, in block 187, in the city of Portland. The parties claimed title under one Bernard Brady, late of Multnomah county, deceased, as the common source; the plaintiff under and through mesne conveyances from Esther Brady, one of the devisees of the last will of Bernard Brady. The defendants urged that the will was void because of a misdescription and that parol evidence was inadmissible in aid of its construction. The fourth clause of the will contained the following: "As also a certain parcel of ground or lots in the city of Portland, and numbered as follows, to-wit: No. block (187) one hundred and eighty-seven, lot No. (2) two, I bequeath to Margaret McGill." The sixth clause of the will reads: "I also bequeath to my sister, Esther Brady, that lot, or parcel of ground, in the city of Portland, as here described, lot No. (1) one, in block (187) one hundred and eighty-seven." It was disclosed that Bernard Brady never owned either lots 1 and 2 in block 187, but did, at the date of his will, and when he died, own lots 3 and 4 in said block. The court sustained the will, holding that by rejecting the erroneous part of the description the remainder was sufficient to identify the property with reasonable certainty. Boise, J., in delivering the opinion of the court, said: "The de-

Hubermann v. Evans.

wise is the same as if the numbers of the lots had not been mentioned at all or had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to-wit: 'A certain parcel of ground or lots in the city of Portland, in block No. 187; also, that lot or parcel of ground in the city of Portland in block 187.' And by thus placing ourselves in the position of the testator, by oral evidence at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them."

Riggs v. Myers, 20 Mo., 239, was an interpretation of a will, which described the land devised as the "southeast and southwest quarters of section 4 in township 60, range 38, in Holt county, Missouri," with the privilege of using the water of the Big spring, having free access to and from it as he may wish. It being shown by parol evidence that the testator owned the corresponding section of township 59 of the same town, range and county, and that the Big spring was upon the southeast quarter of section 4, in township 59, and did not own any land in section 4 of township 60, it was held the false description should be rejected, and that the will passed the lands in section 4 of township 59. (See, also, *Lessee of Allen v. Lyons*, 2 Wash. C. C. [U. S.], 475; *Winkley v. Kaime*, 32 N. H., 268.)

In *Melvin v. Proprietors of Locks and Canals*, 5 Met. [Mass.], 15, the land was described in the deeds from the heirs of Kittridge to Moses Cheever as follows: "A certain share of 'about one hundred acres of land, be the same more or less, with the buildings thereon standing, situate in the town of Chelmsford, in the county of Mid-

dlesex, being the same estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Kittridge by deed dated the 25th day of April, 1782.'” The two descriptions did not agree, and the question before the court was which should be considered the true description. It was held that the conveyances passed the title of the heirs to the whole farm, notwithstanding the deed from the Melvins to Kittridge, which was referred to in the conveyances, did not include the whole premises. The court say: “It is another well-known rule in the construction of deeds and other instruments that if some of the particulars of the description of the estate conveyed do not agree, those which are uncertain and liable to errors and mistakes must be governed by those which are more certain. Thus the boundaries of lands by known monuments are always to control the description by courses and distances, and so courses and distances will control the quantity of land expressed. Another rule of construction is that if the description be sufficient to ascertain the estate intended to be conveyed it will pass, although some particular circumstance be added inconsistent with the description.” The same court in the case of *Sawyer v. Kendall*, 10 Cush. [Mass.], 241, said: “The remaining objection to the demandant’s right to recover is that he shows no title to the land claimed, because the description in the deed from Nancy Brown to the demandant, by metes and bounds, does not include the demanded premises, and that the particular description is not to be controlled by the reference in the deed to the partition of the estate by the commissioners and the bounds therein given which do comprehend the premises in dispute. The principle on which this objection rests is well founded, and were it applicable, would be decisive of this case. But upon comparing the metes and bounds given by the deed with the plan referred to upon which they were laid down, and which is also made a part of the

Hubermann v. Evans.

particular description, it will be found that they do not correspond, and that it is impossible to trace out and mark the granted premises with intelligible certainty by following the description contained in the deed. By reason of some unexplained error, the metes and bounds in that part of the description which applied to the demanded premises are wholly uncertain, and it is impossible to ascertain by them the precise land granted by the deed. It is not a case, therefore, of two inconsistent descriptions in which the general must yield to the particular, but of an uncertain and impossible description, which must be controlled by an intelligible though general description given by a reference to the grantor's title by partition. (*Melvin v. Proprietors of Locks and Canals*, 5 Met. [Mass.], 15-28.)"

In the case of *Worthington v. Hylyer*, 4 Mass., 196, the mortgage described the property as "all that my farm of land in said Washington, on which I now dwell, being lot No. 17 in the first division of lands there, containing 100 acres with my dwelling house and barn thereon standing, bounding west on land of Joseph Chaple, northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." The land claimed under the mortgage was not included in lot 17, nevertheless the court, by Parsons, C. J., decided that it passed under the first description, and that the additional description being inconsistent therewith, was to be rejected. In the opinion it is said: "If the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance that the intent of the parties may be effected." The same doctrine has been held and applied in *Brookman v. Kurzman*, 94 N. Y., 272; *Zink v. McManus*, 49 Hun [N. Y.], 583; *Schoenewald v. Rosenstein*, 5 N. Y. Sup., 766; *Peterson v. Ward*, 23 S. W. Rep. [Tex.], 637.

Boardman v. Reed, 31 U. S., 328, was a suit to eject-

ment to recover 8,000 acres of land. The property was described in the patent as lying and being in Monongalia county, while it appeared from parol proof that at the date of the patent it was not situated in said county but in the county of Harrison. The other calls of the patent placed the land in the last named county. The court, by Justice McLean, held the grant was not void for uncertainty, and said: "The contradiction supposed was in the admission of proof that the land covered by the patent is in the county of Harrison, when the patent calls for it to lie in the county of Monongalia. That certain calls in a patent may be explained or controlled by other calls, was settled, and in reference to this very point, by this court, in the case of *Stringer's Lessee v. Young*, before referred to. If the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt. The entire description in the patent must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void. This, however, was not the case of the patent under consideration. Its calls are specific, and, taking them all together, no doubt can exist as to the land appropriated by it. The call for the county may be explained, either by showing that it was made through mistake, or that, under the circumstances which existed at the time of the survey, it was not inconsistent with the other calls of the patent. This would not be going behind the patent to establish it, for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies, under some circumstances, to the construction of all written instruments."

An administrator's deed described the granted premises as "lot 2, in block 6, or the west half of block 6, in the town of Lamar." It was held that the description of the premises as "lot 2" should be rejected as false, and the description as the west half of the block should be taken as the true one, it being shown that lot 2 constituted the east half of the block, and that the administrator's intestate owned only the west half. (*Bray v. Adams*, 114 Mo., 486.)

The doctrine recognized in the foregoing authorities is not confined alone to cases involving the construction of deed and will, but is equally applicable to cases like the one before us. Authorities in harmony with this view are not wanting.

Schnell v. City of Chicago, 38 Ill., 383, was a suit by the city to enjoin the defendants from prosecuting an action of ejectment brought to recover certain lots in Canal Trustees' subdivision of section 33, held and claimed by the city, it having purchased the same at an administrator's sale made in pursuance of an order granted by the county court. It appears that the petition of the administrator for a license to sell the lands of the intestate, for the purpose of paying the debts of the deceased, described the premises correctly as certain lots lying in section 33. They were, however, described in the abstract from the county court attached to the petition, and in the inventory from which the abstract is, by law, to be taken, and also in the order of sale, as being in section 23. The notice of the sale, and the deed made by the administrator to the purchaser, gave the true location of the premises. It was held that the misdescription of the section mentioned was a mere clerical error, not affecting the validity of the sale, and not available in a collateral proceeding involving the title. The identical question was raised and decided the same way in *Berry v. Young*, 15 Tex., 369.

The case of *Mauarr v. Parrish*, 26 O. St., 636, is quite analogous to that now before us. It was an action by

Laura Parrish against Elizabeth Mauarr, to recover lot 174 in the town of East Ironton. The defendant claimed title under the sale of the lot by plaintiff's guardian, under an order of the probate court. In her answer she set forth a copy of the proceedings relating to said sale, by which it appeared that in the petition of the guardian for an order to sell the real estate of the ward, the premises were described as lots 73, 74, and 75, in East Ironton, while in the order of sale in the case the lots were designated as 173, 174, and 175, in said town, the latter being the true description of the lots owned by the ward, which had descended to her from an ancestor, and which were actually sold by the guardian under said license. It did not appear whether Laura owned in East Ironton any lots numbered 73, 74, and 75, and whether she owned other real estate than the three lots sold. A demurrer to the answer on the ground that it showed no legal sale of the lots by the guardian was sustained by the trial court, which judgment was, on a review of the case, reversed. The supreme court, speaking through Welch, C. J., uses the following language: "The question presented by the first objection is, whether the order of sale made by the probate court is not void on the ground that the lots so ordered to be sold are not described in the guardian's petition, and that, therefore, the court acquired no jurisdiction over the lots sold. Had the pleader set forth in the answer all the material facts relating to the ward's property, there would probably have been but little difficulty in deciding the question. If it be the fact that the ward really owned six lots in East Ironton, numbered 73, 74, 75, 173, 174, and 175, and that they all 'descended to her from an ancestor,' the question presented would have been whether, upon application by the guardian to sell only a part of the ward's estate, without any description of the ward's other property, or any disclosure of the fact that the ward had other property, the court acquired jurisdiction over her entire estate. This question, however, we

Hubermann v. Evans.

think does not arise in the present case. It seems to us that there is upon the face of this record of proceedings in the probate court, taken in connection with the answer setting it forth, sufficient to satisfy anyone that the number of the lots in the petition of the guardian as 73, 74, and 75, instead of 173, 174, and 175, was a mere clerical mistake of the draughtsman. We come to this conclusion for several reasons: (1) The mistake is one easily fallen into; (2) the extreme improbability that the same person should own six lots happening thus to vary exactly 100 in their numbers; (3) the statute requires the guardian to set forth in his petition a description of all the ward's real estate, and until the contrary is shown we must presume that in this respect the petition conformed to this requirement. The petition, therefore, should be viewed as asking for the sale of three lots situate in East Ironton, being lots which descended to the ward, and being all the real estate owned by her, and numbered 73, 74, and 75. Here is simply a case of a description, repugnant with itself, but containing sufficient within itself to enable the court to make the proper correction, by eliminating from it what was false, and supplying what was true, so as to make it conform to the real intention of the parties. This we must presume the court did, and that it was done upon a proper showing, or proper knowledge of the subject-matter. We are satisfied that the lots really sought to be sold, and the lots so sold are identical, and that this mistake in the petition does not affect the jurisdiction of the court, or render the order of sale absolutely void."

Myers v. McGavock, 39 Neb., 843, was an action in ejectment to recover real estate in the city of Omaha, sold by a guardian under a license issued out of the district court of Douglas county. The premises were described in the proceedings instituted by the guardian, and in the guardian's deed, as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8), in block two hundred and three (203), in the city of Omaha,

being all that portion of said lot eight (8), not belonging to the Union Pacific Railway Company." It was ruled that the proceedings were not void for indefiniteness and uncertainty of description, but that the description was sufficient to enable the property to be identified, and to divest the title of the wards to all of that portion of the lot not owned by said railway company. In the case just mentioned there were two conflicting descriptions, and the false one was required to yield to the one which was true.

In the brief of plaintiffs it is said "the expression of one thing is always to the exclusion of others, and the particular description given in the application limited the license and the request therefor to what was properly described therein." The principle sought to be invoked is a familiar one, but we are unable to see its application to this case. Ordinarily a general description of property must yield to a specific description in the same instrument. But this rule does not obtain where such specific description is impossible or false, as the authorities herein cited abundantly show. If the particular description given in the proceedings by the guardian had designated the lot in this case as being in a block having an existence in fact and the plaintiff owned that numbered lot in such block, then there would be ground for argument that the description of the ward's real estate in general terms, as all the real estate, would confer no authority to sell lot 4 in block U. But that is not the case with which we have to deal. The distinction between the supposed and real case is manifest. Here the particular designation of the lots for which application was made to sell, as to some of them, is false and fits no property. It being manifest that authority was requested to sell lands other than these which were correctly described in the proceedings the erroneous description must give way to the general description, and by the latter the identity of the land requested and ordered sold can be ascertained by the aid of extraneous evidence.

FOX v. Graves.

Applying the principle already announced to the case in hand, there can be no question as to the validity of the guardian's sale and deed. In the petition of the guardian and the order of sale, the lot in dispute, and others, were described as being in block W, in Lowe's Addition to Omaha, whereas there is no such block in said addition; hence this portion of the attempted specific description of the property in the proceedings for license is in fact no description, and should be regarded as surplusage. Doing this we but apply the maxim *falsa demonstratio*, etc., for, after such rejection, enough is left to enable the property ordered sold to be identified. The inaccuracy or mistake in designating the block in which the lot was located did not make the description of the property void for uncertainty. The real estate of the ward was specifically and accurately given in the guardian's advertisement or notice of sale. That the lot was described in the petition and order of sale as being in block W instead of block U was clearly a clerical mistake, and the court granting the license must have so regarded it, for it confirmed the report of the sale which was accompanied by the notice of the sale and the proof of its publication, and ordered the guardian to execute a deed to the purchaser for the lands so sold. It is clear that the guardian's deed passed whatever title the plaintiffs may have had to the lot in controversy. The judgment is

AFFIRMED.

FOX, CANFIELD & COMPANY V. GEORGE GRAVES.

FILED JANUARY 21, 1896. No. 5854.

1. Pleading. Although the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to general demurrer.

2. **Verdict: PRACTICE.** A verdict must not exceed the sum prayed for in the petition. If it does, objection on that ground should be raised in the motion for a new trial, or it will be deemed waived.
3. **Pleading: COUNTS: PRACTICE.** Where a petition contains inconsistent counts, the proper motion is to strike out all but one, or require the plaintiff to elect upon which cause of action he will proceed to trial.

ERROR from the district court of Madison county. Tried below before POWERS, J.

Brome, Burnett & Jones, for plaintiffs in error:

Where an uncertain and indefinite demand is based upon allegations of the petition, from which the amount of recovery sought cannot be definitely computed, the petition does not tender an issue, a cause of action is not stated, and such a pleading will not support a judgment. (*Carter v. Shotwell*, 42 Mo. App., 663; *Hinchley v. Pfister*, 53 N. W. Rep. [Wis.], 21; Bliss, Code Pleading [2d ed.], sec. 165.)

As to arbitration and award the following cases were cited: *Groat v. Pracht*, 31 Kan., 656; *Miller v. Brumbaugh*, 7 Kan., 352; *Bentley v. Davis*, 21 Neb., 685.

Allen, Reed & Ellis, contra.

NORVAL, J.

Defendant in error filed his petition in the district court alleging: "That Fox, Canfield & Co., on the 1st day of May, 1882, and at the times of the purchases and transactions hereinafter stated, was a partnership firm doing business in the state of Nebraska, in Stanton county and adjoining counties; that the sole individual members of said partnership were and are the defendants George Fox, S. S. Canfield, and H. C. Brome; that the defendants, as such partners, in the partnership name, on or about the months of

Fox v. Graves.

May, June, August, September, October, November, and December, of the year 1882, and about the month of November, 1883, bought of plaintiff, and had delivered to them by plaintiff, at their request, lumber, bridge and building material of the reasonable value of \$1,501.38 which defendants agreed to pay on delivery, and on or about the 27th day of September, 1884, plaintiff paid freight for defendants, at their request, the sum of \$132.50, no part of which has been paid except the sum of \$1,026.92; that there is due plaintiff, and remaining unpaid upon said account, the sum of \$606.92, principal, and \$125.95, interest; that a copy of the account for said material sold and freight paid, with all credits thereon, are hereto attached, marked Exhibit A, and made part of this petition. Wherefore plaintiff demands judgment against defendants for the sum of \$734.52, and with interest thereon from July 20, 1885, less amount of certain freight bills with costs.

"Count 2. Plaintiff, for further cause of action against the defendants, states that Fox, Canfield & Co. are a partnership firm carrying on business in Stanton county and adjoining counties in the state of Nebraska, composed of George Fox, S. S. Canfield, and H. C. Brome; that on or about the 1st day of July, 1885, the matters in controversy between plaintiff and defendants, being the amount set forth in Exhibit A, hereto attached, were, by agreement by plaintiff and defendants, referred to Knox Tipple and J. B. Walker as arbitrators, with authority in said arbitrators to consider, ascertain, and settle all matters of account between plaintiff and defendants, and to find the balance due upon such settlement; that on or about the 20th day of July, 1885, the said Knox Tipple and J. B. Walker, after full and thorough examination of matters referred to them as said arbitrators, found that there was due and owing from defendants to plaintiff the sum of \$734.52, except the amount of certain freight bills not promised, which is now due and wholly unpaid; that the balance so found

due by said arbitrators was upon the account set forth in the first count hereof, and it was agreed between the plaintiff and defendants, at the time of the submission of said matters to said arbitrators, 'hat their findings and award should be a final adjustment and complete settlement between the parties in that regard. Wherefore plaintiff demands judgment against the defendants for the sum of \$734.52, and interest thereon from July 20, 1885, less amount of certain freight bills, with cost of suit."

A motion was filed to strike from the petition all of the first count as irrelevant and redundant, immaterial and prejudicial, which motion was denied by the court and an exception was taken to the ruling. Thereupon an answer was filed consisting of a general denial. There was a trial to a jury, with a verdict and judgment for the plaintiff below in the sum of \$169.57. No bill of exceptions having been preserved in the case, but two assignments of error are relied upon for reversal, namely:

"1. The verdict and judgment are contrary to law.

"2. The court erred in overruling the motion to strike out the first count of the petition."

Under the first assignment it is argued that the petition fails to state a cause of action. The record fails to disclose the count under which the recovery was had, or whether under both or but one. Therefore, if either count contains sufficient facts to support the verdict and judgment, the first assignment is not well taken. It will be observed that the plaintiff below, for his first cause of action, alleges, in effect, that he sold and delivered to the defendants timber, bridge and building materials of the reasonable value of \$1,501.38, payable on delivery; that plaintiff paid freight for defendants, at their request, the sum of \$132.50, no part of which has been paid except \$1,026.92, and that there remains due the plaintiff \$606.92 debt, and \$125.95 interest. These averments are sufficient to constitute a cause of action and to authorize a judgment in plaintiff's favor for

\$732.91, which sum is several hundred dollars more than the amount of the verdict and judgment. The objection urged is not that the facts alleged in the petition, aside from the prayer for judgment, are not well pleaded. The contention is that the prayer for relief is so defective as to render the petition insufficient as stating a cause of action. It will be observed that judgment is asked "for the sum of \$734.52, with interest thereon from July 20, 1885, *less amount of certain freight bills.*" It is insisted that this prayer is insufficient to support the verdict, for the reason no certain sum is demanded, or facts alleged from which it can be computed. This contention is predicated upon the italicized words above quoted. Probably if Exhibit A, which was attached to and made a part of the original petition, was not omitted from the transcript, what was meant by the words referred to could be easily ascertained. However that may be, the expression, "less amount of certain freight bills," is not a material statement, and may be disregarded as surplusage. If plaintiff was indebted for freight paid by the defendants, they should have pleaded it as a defense in their answer. The plaintiff was not required to do so for them. While the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to a demurrer upon the ground that no cause of action is set forth. (1 Kinkead, Code Pleading, sec. 66; *Culver v. Rodgers*, 33 O. St., 546; *Hiatt v. Parker*, 29 Kan., 765.) The cases cited by plaintiffs in error, at least those we have been able to examine, do not conflict with the rule just stated. The prayer, in the absence of a motion to strike out the words italicized above, or to make more specific, was, we think, sufficient to support the judgment.

Doubtless, a verdict must not exceed the sum prayed for in the petition. If it does, the objection should be raised in the motion for a new trial, as that the verdict exceeds

the amount demanded in the prayer. The defendants having failed to object to the verdict on that ground in the trial court, they must be considered to have waived the same.

By reference to the petition it will be noticed that the items constituting plaintiff's first cause of action were submitted to arbitrators chosen by the parties, and the arbitrators made an award, and the second count is predicated thereon. It is claimed that the first count of the petition should have been stricken out for the reason the original claim is merged in the award, and is thereby extinguished. This court has held that an award of arbitrators, unless impeached for fraud or mistake, is a bar to an action on the original claim. (*Bentley v. Davis*, 21 Neb., 685.) To the same effect see *Groat v. Pracht*, 31 Kan., 658, and cases there cited. But it does not follow that there was error in denying the motion to strike. The plaintiff had a right to elect upon which count of the petition he would rely. The motion should have been in the alternative to strike from the petition the first count, or require him to elect as to the one upon which he would proceed to trial. (*Keens v. Gaslin*, 24 Neb., 310.) A motion may properly be overruled which cannot be allowed in substantially the same terms as requested. (*McDuffie v. Bentley*, 27 Neb., 380.) The judgment is

AFFIRMED.

ANSON E. JOHNSON V. WILLIAM D. GULICK ET AL.

FILED JANUARY 21, 1896. NO. 5903.

1. **Review:** ARGUMENTS. Errors assigned, but not argued, are deemed waived.
2. **False Representations:** ALLEGATIONS AND PROOF. In actions for false representations it is not necessary to aver or prove that the party making them at the time knew they were untrue.

Johnson v. Gulick.

3. ———: NEGOTIABLE INSTRUMENTS: EVIDENCE. In a suit upon a promissory note given as part payment for corporation stock, the defense being that the defendants were induced to make such purchase by certain false representations of the plaintiff, testimony showing that prior to such sale he made to other persons similar misstatements in the sale to them of a portion of the same series of stock is irrelevant and immaterial.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Ricketts & Wilson, for plaintiff in error.

NORVAL, J.

Plaintiff in error brought suit in the court below upon a promissory note for \$1,296, purporting to be made by the defendants in error, bearing date January 1, 1891, and payable April 1 thereafter, with interest at eight per cent. The defendants, for answer, admit the execution and delivery of the note, but aver that it was given in renewal of a note of \$1,200 executed by the defendants as part consideration of three-fifths of the corporate stock in the Commercial Publishing Company, of Ogden, Utah; that plaintiff, in order to induce the defendants to make said purchase, knowingly and falsely represented to them that said corporation was the owner of a franchise in the Western Associated Press of the value of \$4,000; that the defendants relied upon said representations; that the same were false and untrue; and that the defendants have been thereby damaged in the sum of \$2,000. The reply was a general denial of each averment of new matter contained in the answer. There was a jury trial, resulting in a finding that there was due the plaintiff from the defendants upon the note declared upon the sum of \$1,425.60, and that there was due the defendants upon the counter-claim the sum of \$1,389, and the amount of the plaintiff's recovery was assessed at the difference between said amounts, to-wit, \$36.60.

Judgment was rendered in accordance with the verdict, and plaintiff brings error.

Thirty-six errors have been assigned, while but one has been argued in the brief of plaintiff. It relates to the rulings of the trial court upon the admission of testimony. All other errors assigned are regarded as waived and will not be considered by the reviewing court. (*Gulick v. Webb*, 41 Neb., 706.)

Upon the trial evidence was introduced tending to establish the allegations of the counter-claim set up in the answer. The defendants, in making out their case, produced and read the deposition of one J. S. Painter, who, after testifying that he and one Murphy, the last of November or the first of December, 1889, which was prior to the sale of the stock to the defendants, purchased of the plaintiff Johnson six-tenths interest in the *Ogden Daily Commercial*, deposed in answer to questions as follows:

Q. State whether or not at the time, while negotiations were pending between yourself and Murphy, as parties of one part, and the plaintiff Johnson, as party of another part, for the purchase and sale of this stock, any statements or representations were made to you by the plaintiff Johnson concerning the Western Associated Press franchise possessed or owned by the *Ogden Daily Commercial*.

A. Yes, sir; there were such representations made. I had a number of conversations with Mr. Johnson in regard to the purchase of the paper. I do not remember just exactly when the first one was had. The second one was had about November 20, 1889. I went into the office and looked it over. Mr. Johnson was not in. I returned to the local editorial room. We went into the editor-in-chief's room, and had a talk about the paper.

Q. What I want to get at is any conversation between yourself and Mr. Johnson about the franchise.

A. I told him I thought I could duplicate good material in the office for \$2,000, and he says the franchise was ex-

clusive and was worth \$10,000, and that if he was circumstanced differently than he was at that time, he would not take less than \$25,000; that it would be worth that in two years.

Q. What exclusive franchise did he refer to?

A. Associated Press franchise.

Q. As being owned and possessed by the Ogden *Daily Commercial*?

A. He said so.

Q. Was the representation as to the paper owning and possessing this Associated Press franchise made to you more than once by Mr. Johnson?

A. It was made to me on two or three occasions. Every time we talked about the matter it was discussed, because I looked upon it, from what he said, as being the most valuable part of the paper.

Each question was objected to at the time the same was propounded as being incompetent, irrelevant, and immaterial, and an exception was duly taken to the overruling of the objection. The assignment argued by plaintiff is based upon the admission of the testimony quoted above. He now insists that the objection to receiving the evidence should have been sustained, because proof of representations made by the plaintiff to persons other than the defendants does not tend to establish that the representations charged in the answer were made as therein stated. We think this position sound. The evidence was clearly inadmissible, and had the effect to mislead the jury. From the fact that the plaintiff made the representations to Painter testified to by him, the inference cannot be properly drawn that the same or similar representations were made by plaintiff to the defendants. As is stated in 1 Phillips, Evidence, p. 748*: "It is considered, in general, that no reasonable presumption can be formed as the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts

with other persons. Still less can a party be affected by the declarations, conduct, or dealings of strangers. Transactions which fall within either of these classes are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected. Where the question between a landlord and his tenant is whether the rent was payable quarterly or half-yearly, it has been held irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due." (1 Greenleaf, Evidence, sec. 53; 1 Wharton, Evidence, sec. 29.) In *Somes v. Skinner*, 16 Mass., 360, it is said: "It is not competent to a party, imputing fraud to another, to offer evidence to prove that the other has dealt fraudulently at other times, and in transactions wholly disconnected with that which is on trial." Evidence of other transactions than those under investigation is admissible, but only for the purpose of proving the *scienter* or intent, when that is in issue in the case. The defendants have failed to furnish us either with a brief or oral argument in this case; hence we are not advised of the theory upon which they introduced the evidence. Possibly it was offered and admitted upon the ground that it was essential for the defendants to establish the *scienter*; that is, that the plaintiff, at the time of making the representations, knew them to be false. Whether in an action for damages for false representations it is necessary either to aver or prove the *scienter*, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case (*Philips v. Jones*, 12 Neb., 213; *Foley v. Holtry*, 43 Neb., 133; *Carter v. Glass*, 44 Mich., 154; *Shippen v. Bowen*, 122 U. S., 575); and the trial court so instructed the jury in the case at bar. It is true the answer sets up that the plaintiff knowingly made false representations, but as it was unnecessary to aver the fraudulent intent, the defendants were not called upon to prove

Argabright v. State.

it. It follows that the evidence introduced to show that the plaintiff made similar misstatements to persons other than the defendants in the sale to them of a portion of the same series of stock in the Commercial Publishing Company as that sold to defendants, was incompetent and immaterial. For the error pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN W. ARGABRIGHT V. STATE OF NEBRASKA.

FILED JANUARY 21, 1896. No. 8148.

Bill of Exceptions: ORDER FOR TRANSCRIPT OF EVIDENCE.

PRACTICE. An order will not be made in this court requiring a reporter of the district court to prepare a transcript of evidence preliminary to the settlement of a bill of exceptions, when the record discloses that a like order had been made by the proper district judge upon the precedent condition that the reporter's legal fees should first be paid, there being shown neither a compliance with such order, nor an attempt to review it.

ERROR to the district court for Nemaha county. Tried below before BABCOCK, J.

HEARD ON a motion by plaintiff in error to compel the court stenographer of the first judicial district to furnish a transcript of the evidence upon which the case was tried. *Motion overruled.*

W. H. Kelligar and John S. Stull, for the motion.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, contra.

RYAN, C.

The plaintiff in error has applied to this court for an order to compel the reporter of the first judicial district of this state to furnish a transcript of the evidence upon which this cause was tried. We find in the record that, upon an application to Hon. A. H. Babcock, the district judge who presided at said trial, for an order requiring that said evidence be extended without payment, on account of the poverty of the plaintiff in error, said order was refused, but that in that connection it was found that the said reporter, as a condition precedent to making the transcript required of him, had demanded from one of the attorneys of plaintiff in error his fees for making such transcript, but that such payment had been refused. It was ordered, however, that said reporter furnish the required bill of exceptions upon the tender to him of his legal fees for such services. As there has been no attempt to review or comply with the order, plaintiff in error is not entitled to the order asked in this court. Accordingly it is denied.

MOTION OVERRULED.

PETER WENDELL V. STATE OF NEBRASKA.

FILED JANUARY 21, 1896. No. 7745.

ARSON: ACCESSORIES: INFORMATION. Under section 54 of the Criminal Code it was erroneous, over proper objections, to try a defendant upon the charge of burning a schoolhouse, joined with one for causing such burning to be done by another person.

ERROR to the district court for Kearney county. Tried below before BEALL, J.

J. L. McPheely and *C. J. Dilworth*, for plaintiff in error.

A. S. Churchill, Attorney General, and George A. Day, Deputy Attorney General, for the state, cited: Bishop, New Criminal Procedure, sec. 422; Candy v. State, 8 Neb., 483; Aiken v. State, 41 Neb., 264.

RYAN, C.

Plaintiff in error was tried in the district court of Kearney county upon an information containing three counts and found guilty upon the second count. Omitting such matters as are not essential to the understanding of the questions presented, these counts were as follows:

First count—"That on the second day of April in the year of our Lord one thousand eight hundred and ninety-five, one Peter Wendell then and there being * * * did then and there unlawfully, willfully, and maliciously, and feloniously procure, incite, and cause one Ben Pearson then and there being unlawfully, willfully, maliciously, and feloniously to set fire to and burn one schoolhouse," etc.

Second count— * * * "That on the second day of April, A. D. 1895, one Ben Pearson * * * did, then and there, unlawfully, willfully, maliciously, and feloniously set fire to and burn one schoolhouse * * * and that Peter Wendell, then and there being, did, before and at the time of said burning, unlawfully, willfully, maliciously, and feloniously * * * procure, incite, aid, abet, and cause the said Ben Pearson to set fire to and burn said schoolhouse," etc.

Third count— * * * "That on the second day of April, in the year of our Lord one thousand eight hundred and ninety-five, Ben Pearson * * * did, then and there, unlawfully, willfully, maliciously, and feloniously, set fire to and burn one schoolhouse there situated * * * and that one Peter Wendell, then and there being in said county and state aforesaid, then and there did hire and

cause said Ben Pearson to set fire to and burn said schoolhouse in the manner and form aforesaid," etc.

In the second count there is charged that Ben Pearson was guilty of the crime of arson, and that he was feloniously thereto instigated by the plaintiff in error. In this respect the three counts are alike. In the second count, which was that on which Wendell was found guilty, and which therefore is specially essential in this case, there was contained the charge that Wendell not only procured, incited, abetted, and caused Pearson to do the burning, but it was as well charged that Wendell aided Pearson in the act. The conviction was under section 54 of the Criminal Code, in which it is provided that "If any person shall willfully and maliciously burn or cause to be burned any dwelling house, etc. * * * every person so offending shall be deemed guilty of arson and shall be imprisoned in the penitentiary not more than twenty years, nor less than one year."

The instructions given by the court were evidently framed upon the theory that in the second count of the information there was charged but one offense, for in the second instruction given by the court was contained this language: "In this case the substantive offense charged is the willful, unlawful, and felonious setting fire to said schoolhouse in said county of Kearney and state of Nebraska, on or about the time alleged in the information, and, as hereinbefore stated, the defendant might have committed the same, if such offense was committed, by personally setting fire to and burning said schoolhouse, or by causing or procuring another unlawfully to do it, or by aiding, assisting, or abetting such other person in such unlawful burning. The state has seen fit to charge the defendant in this case with such burning, in each of the ways above set out. This it may lawfully do." The fourth instruction was in the same line as the second, while in the sixth occurs this language: "The court instructs the jury that if you believe

Wendell v. State.

from the evidence in this case, beyond a reasonable doubt, that the defendant either personally, unlawfully, and willfully, burned the schoolhouse by setting fire thereto, or that he caused or procured another to unlawfully and willfully set fire to said schoolhouse, or knowing that another intended to unlawfully and feloniously set fire to said schoolhouse and burn the same aided, abetted, or assisted such person in the commission of said offense in said county and state, * * * then in either case said person would be guilty and liable as a principal of the unlawful and felonious burning of said schoolhouse." By these instructions there is presented the question whether or not two distinct offenses were charged in the count of the information upon which the plaintiff in error was found guilty. The court assumed that there was charged but one offense. Counsel for the plaintiff in error insists that there were two, each distinct from the other, and there has been no failure properly to preserve that question upon the record.

No case has been called to our attention in which is considered the language of a statute similar to that above quoted. It seems to us, however, that this differs from a case wherein is charged burglary and larceny in conjunction, for in such case the larceny is but the consummation of the intent with which the burglary is committed. Again, it is said, in section 449, 1 Bishop, Criminal Procedure [3d ed.]: "If the pleader is uncertain whether the transaction will appear in the proofs to be embezzlement or larceny, and both are felonies, he may have a count or counts for each. Under like circumstances counts may be joined for embezzlement and false pretenses." It does not seem to us that any of these considerations justify the joinder of the offense of aiding in burning a house with that of hiring, causing, or procuring another to commit such arson. The proof that Pearson set fire to the schoolhouse described, in no way tended to connect Wendell with the offense of causing Pearson to commit this crime. Proof that Wendell aided Pear-

Kreamer v. Irwin.

son is direct evidence of his participation in the offense of Pearson. Proof that Wendell instigated Pearson is evidence only that he in some measure was responsible for the formation of a felonious intent by Pearson, but this intent, if never carried into effect, constituted no crime. If, however, the fruition of this intent was the consummation of the crime urged upon Pearson by Wendell, then Wendell became liable for the part which he had taken in the origination of Pearson's felonious intent and must answer accordingly. It is possible, that by statute the promoter of the arson might be made liable for its commission, but in our view section 54 of the Criminal Code is not so framed as to express such an intention on the part of the legislature. The judgment of the district court is

REVERSED.

CALVIN A. KREAMER V. ALFRED IRWIN.

FILED JANUARY 21, 1896. No. 5961.

1. **Breach of Contract: DAMAGES.** In a suit by a contractor against his contractee for damages for the latter's failure to permit him to perform the work contracted to be done, the contractor's measure of damages is the profit he would have made on the contract had he performed it.
2. **Trial: ABSENCE OF WITNESSES: PRACTICE.** A litigant whose witnesses are absent when his case is called for trial, and who makes no objection then to the trial proceeding on that account, cannot be heard to complain in his motion for a new trial that he was prejudiced by the trial taking place when his witnesses were absent.
3. **Damages: EVIDENCE.** The evidence examined and held to sustain the verdict of the jury.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

Pound & Burr, for plaintiff in error.

Davis & Hibner, contra.

RAGAN, C.

In the district court of Lancaster county, Calvin A. Kreamer sued Alfred Irwin, alleging in his petition that in April, 1889, a contract was entered into between the parties in and by which Kreamer agreed to furnish the labor, materials, and tools, and raise and level the floor of a store building belonging to Irwin, for all of which labor and material the latter was to pay Kreamer the sum of \$100; that in pursuance of this contract he made preparations to do the work at great expense, hired help, and moved his materials and tools on the ground, and refused other work in order to perform his contract; that Irwin refused to permit him to carry out his contract, to his damage in the sum of \$65. The answer was a general denial. There was a trial to a jury and a verdict for Irwin, upon which judgment was rendered, dismissing Kreamer's action, to reverse which he prosecutes to this court a petition in error.

1. It is first insisted that the verdict of the jury is not supported by sufficient evidence. On the contrary we think it is. Assuming that the contract was made between Kreamer and Irwin as the former contends; that Kreamer was at all times ready and willing to perform the contract; made preparations at an expense to himself, and that Irwin refused to permit him to perform his contract, the measure of Kreamer's damages would be the difference between the contract price of the work and what it was reasonably worth to perform it in accordance with the contract. In other words, the measure of Kreamer's damages would have been his profits on the contract had he performed it. Now if there is any evidence in the bill of exceptions in this case which shows or tends to show what it would have cost

Kreamer to do the work as agreed, what it was reasonably worth to do the work according to the contract, what his profits would have been had he performed the contract, we have failed to find it. If Kreamer had established the making of the contract, pleaded his readiness, willingness, and ability to perform it, and that Irwin refused to permit him to carry it out, then, notwithstanding he failed to show that he had suffered any damages, doubtless he would have been entitled to recover nominal damages. But the jury has also found by its verdict that the contract pleaded by Kreamer was never made, and while this evidence is conflicting it supports the finding of the jury. The evidence tends to show that Kreamer made a proposition to Irwin to do the work for one hundred dollars, but it also tends to show that Irwin did not accept this proposition, and the jury may have concluded that the proposition made by Kreamer to Irwin was never accepted by the latter. If it did so, its conclusion is supported by the evidence.

2. It is next assigned as error that the court erred in compelling Kreamer to go to trial in the absence of material witnesses. If Kreamer made any application for the postponement of the trial in this case or its continuance at any time on account of the absence of witnesses, the record does not disclose it. Kreamer's complaint that he was compelled to go to trial in the absence of material witnesses appears in the record for the first time when he filed his motion for a new trial. When his case was called for trial, if he was not ready on account of the absence of witnesses whose testimony was material for him, he should have applied to the court then and there for the postponement of the trial on that account. A litigant whose witnesses are absent when his case is called for trial, and who makes no objection then to the trial proceeding on that account, cannot afterwards be heard to complain in his motion for a new trial that he was prejudiced by the trial taking place when his witnesses were absent.

Campbell Printing Press & Mfg. Co. v. Dyer.

There is no error in the record and the judgment of the district court is

AFFIRMED.

CAMPBELL PRINTING PRESS & MANUFACTURING COMPANY V. ELLA M. DYER ET AL.

FILED JANUARY 21, 1896. No. 5980.

1. **Sales: ESTOPPEL.** A purchaser cannot successfully assert a greater interest in personal property than his vendor had, unless the real owner of the property, by his conduct, has estopped himself from asserting his title to the chattel.
2. **Conditional Sales.** A contract for the sale of personal property upon condition that the title is to remain in the vendor until the purchase price is paid is valid as between the parties, and valid as against third parties dealing with the property without notice, unless such third parties are purchasers, judgment or attaching creditors of the conditional vendee.
3. **Chattel Mortgages: SALES.** A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes.
4. **Conditional Sales: CHATTEL MORTGAGES: REPLEVIN.** A contract between a manufacturing company and a printing company provided: "The manufacturing company hereby agrees to sell at the sum of \$—— to the printing company [a printing press, described] to be delivered, boxed, on cars at its factory * * * warranted free from defects of material and manufacture. * * * The printing company hereby agrees to buy such presses * * * and to pay therefor, on receipt of bill of lading of same, cash \$——, and the balance in payments, evidenced by purchaser's notes. * * * The title to the said property shall remain in the seller until the purchase price with interest has been fully paid, and in case of any default in any of the terms of this contract the seller shall have the right to take immediate possession of said property." The presses were received by the printing company, put up, and used in its business, but it did not make the cash payment nor execute the notes as agreed. The printing company subsequently pledged

these presses by a chattel mortgage to a bank to which it was indebted. The bank duly filed its mortgage and took actual possession of the presses. In an action of replevin by the manufacturing company against the bank, *held*, (1) that the printing company never acquired any title to the presses, and by its default had forfeited its right to their possession as against the manufacturing company; (2) that the manufacturing company was entitled to the possession of the presses as against the bank.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Breckenridge, Breckenridge & Crofoot, for plaintiff in error, cited: *Davis v. Giddings*, 30 Neb., 209; *Dows v. Kidder*, 84 N. Y., 121; *Tyler v. Freeman*, 3 Cush. [Mass.], 261; *Whitney v. Eaton*, 15 Gray [Mass.], 225; *Adams v. O'Connor*, 100 Mass., 515; *Hirschorn v. Canney*, 98 Mass., 149; *Stone v. Perry*, 60 Me., 48; *Seed v. Lord*, 66 Me., 580; *Hodgson v. Barrett*, 33 O. St., 63; *Paul v. Reed*, 52 N. H., 136; *Pond Machine Tool Co. v. Robinson*, 37 N. W. Rep. [Minn.], 99; *Briggs v. Ewen*, 42 N. W. Rep. [Ia.], 303; *Empire State Type Foundry Co. v. Grant*, 21 N. E. Rep. [N. Y.], 49; *Ballantyne v. Appleton*, 20 Atl. Rep. [Me.], 235; *Thorpe v. Fowler*, 57 Ia., 541; *Mathewson v. Belmont Flouring Mills Co.*, 76 Ga., 359.

Hall, McCulloch & Clarkson, *contra*, cited: *Morse, Banks & Banking*, sec. 111; *Wade*, Notice, sec. 683; *Pringle v. Dunn*, 37 Wis., 451.

Clinton N. Powell and *Howard B. Smith*, also for defendants in error.

RAGAN, C.

In February and May respectively, 1890, the Campbell Printing Press & Manufacturing Company, a corporation domiciled in the state of Massachusetts, and hereinafter called the "Manufacturing Company," and the Western

Campbell Printing Press & Mfg. Co. v. Dyer.

Printing Company, a corporation domiciled in the city of Omaha, and hereinafter called the "Printing Company," entered into two contracts in writing, substantially alike, and the terms of which, so far as material here, were as follows :

"The Manufacturing Company hereby agrees to sell at the sum of \$—— to the Printing Company [here follows in each contract a description of a printing press], to be delivered, boxed, on cars at its factory in Massachusetts, * * * warranted free from defects of material and manufacture. * * * The Printing Company hereby agrees to buy said press as within specified, and to pay therefor, on receipt of bill of lading of same, cash \$——, and the balance in payments, evidenced by purchaser's notes of even date with said bill of lading and bearing six per cent interest, as follows: [here follows the amount of each note, the time it is to run and by whom the notes are to be indorsed], the purchaser to deliver the said notes with the cash; the seller to send erector to superintend erection of press, paying for erector's time, hotel bills, and all traveling expenses.

"It is further agreed that the title to the said property shall remain in the seller until the purchase price with interest has been fully paid, and in case of any default in any of the terms of this contract the seller shall have the right to take immediate possession of said property."

Soon after the making of said contracts, the printing presses mentioned in said contracts were shipped to the Printing Company at Omaha, and it received them and put them up in its printing house and used them in its printing business. The Printing Company did not make the cash payments, nor execute the notes as agreed. No copy of either of these agreements was filed in the office of the county clerk of Douglas county. In August, 1890, the Printing Company executed to the Omaha National Bank and Ella M. Dyer two chattel mortgages upon the

printing presses to secure debts amounting to about \$20,000 owing by the Printing Company to the bank and Dyer. The mortgagees filed their mortgages in the office of the county clerk of Douglas county and immediately took possession of the mortgaged property. Some weeks after this the Manufacturing Company instituted this suit—an action in replevin—in the district court of Douglas county against the bank and Dyer for the printing presses. The Manufacturing Company based its action on the contracts quoted above, claiming that inasmuch as the Printing Company had never paid the purchase price of the presses that the title to them had never passed to the Printing Company, and that by reason of its failure to execute the notes and make the cash payments agreed, it, the Manufacturing Company, was entitled to possession of the presses. The bank and Dyer claimed to be innocent mortgagees of the property from the Printing Company without actual notice of the contract existing between the Manufacturing Company and the Printing Company. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of the bank and Dyer, upon which the court rendered a judgment that the Manufacturing Company return the presses to them or pay them \$1,500 in money, the stipulated value of the presses. To reverse this judgment the Manufacturing Company prosecutes to this court a petition in error.

For the purposes of this opinion we assume that neither the bank nor Dyer had any actual notice of the existence of the terms of the contract between the Manufacturing Company and the Printing Company, and there is no claim made that any copy of either of these contracts was ever filed in the office of the county clerk of Douglas county. Section 26, chapter 32, Compiled Statutes, provides: "That no sale, contract, or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition shall be valid against any

purchaser or judgment creditor of the vendee or lessee in actual possession obtained in pursuance of such sale, contract, or lease without notice, unless the same be in writing signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides," etc. The contract between the Manufacturing Company and the Printing Company was and is one wherein the transfer of title of personal property is made to depend upon a condition, namely, the payment by the Printing Company of the purchase price of the presses. The bank and Dyer obtained their mortgages upon these presses from the Printing Company, the conditional vendee, while it was in the actual possession of the presses. If the bank and Dyer had purchased from the Printing Company while it was in possession, or if the bank and Dyer claimed a title to or lien upon these presses by reason of their being judgment creditors of the Printing Company, then it is clear that they would be protected by the statute just quoted; but is a mortgage of personal property made by a conditional vendee in possession thereof within the statute? It will aid us in answering this question to ascertain what the rights of the parties to this contract were between themselves, and what the rights were of third persons dealing with this property without notice, prior to the enactment of the statute just quoted.

In *Aultman, Miller & Co. v. Mallory*, 5 Neb., 178, Aultman, Miller & Co. had sold to one Johnson a mower, taking from him in payment thereof a note which provided that the title to the mower should remain in Aultman & Co. until the note was paid. A judgment creditor of Johnson's levied an execution upon the mower and Aultman & Co. replevied it. The court said: "A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed,"—and accordingly held that the title to the mower remained in

Aultman & Co. This decision is based upon the correct principle that one cannot successfully assert a greater interest in personal property than his vendor had, unless the real owner of the property by his conduct has estopped himself from asserting his title to the chattel. Applying the doctrine of this case to the contract under consideration it is evident, in the absence of statute, that as between the Manufacturing Company and the Printing Company the title to these presses could only pass to the Printing Company upon the full payment of their purchase price. The case just cited is an adjudication in this state that the rule of *caveat emptor* applies to sales of personal property; that though one may purchase personal property from another in the actual possession thereof,—purchase it in good faith for a valuable consideration and with the honest belief that the property belongs to the vendor,—yet he will make such purchase at his peril and take only such title as his vendor has.

The doctrine of *Aultman, Miller & Co. v. Mallory, supra*, was before this court in *McCormick v. Stevenson*, 13 Neb., 70, *Norton v. Pilger*, 30 Neb., 860, *Peterson v. Tufts*, 34 Neb., 8, and *McClelland v. Scroggin*, 35 Neb., 536; and in all of these cases the rule, announced in the Aultman-Miller case, that a contract for the sale and delivery of personal property, upon condition that the title should remain in the vendor until the purchase price was paid, was a valid contract as between the parties and binding upon third parties dealing with the property with notice of the agreement between the conditional vendor and vendee, was approved. The Aultman case was decided at the July, 1876, term, and on January 1, 1877, the legislature convened and passed the statute (sec. 26, ch. 32) quoted above. This statute was in effect a legislative command that the decision in the Aultman case should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned; but did the legislature intend that

this provision of the statute should extend to the protection of a mortgagee of a conditional vendee? If it did, it has not said so either expressly or by implication. We must presume that the members of the legislature of 1877 were familiar with the fact that bankers and others were constantly lending money on chattel security; and yet with the decision of the Aultman case before it the legislature in effect said that a contract for the sale of personal property upon condition that the title is to remain in the vendor until the purchase price is paid shall remain valid in this state, as declared by the supreme court, except where third parties dealing with the property without notice are purchasers or judgment or attaching creditors. The temptation is very strong to read into this statute the word "mortgagee," but in this instance our duty does not coincide with our inclination. We are forced to the conclusion that had it been the intention of the legislature that said statute should afford protection to a mortgagee of a conditional vendee or lessee, it would have said so in express terms. (*Steele v. Spencer*, 1 Pet. [U. S.], 550.) We are strengthened in this conclusion by an examination of section 14, chapter 32, Compiled Statutes, which provides that a conveyance of chattels intended to operate as a mortgage shall be void as against creditors, subsequent purchasers, and mortgagees in good faith. This thought seems also to have been present in the mind of COBB, C. J., when writing the opinion in *Norton v. Pilger*, *supra*. It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

F. G. KEENS v. F. Y. ROBERTSON.

FILED JANUARY 21, 1896. No. 5982.

1. **Agreements of Counsel: POWER OF COURT TO VACATE.** Agreements of counsel in regard to the trial of a cause are not absolute although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion when their enforcement would result in serious injury to one of the parties and the other party would not be prejudiced by its being set aside. *McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552, followed.
2. **Continuance: REVIEW.** The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion and the litigant—himself guiltless of negligence or laches—was thereby deprived of an opportunity to make his case or defense. *Home Fire Ins. Co. of Omaha v. Johnson*, 43 Neb., 71, and *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121, reaffirmed.
3. **Instructions: OBJECTIONS: REVIEW.** A litigant cannot for the first time object in this court that the district court erred in giving or refusing to give a certain instruction. He must make his complaint of the action of the court in his motion for a new trial in order to have it reviewed here.
4. **Trial: EVIDENCE: OFFER OF PROOF.** It is not error for a district court to refuse to permit a witness to answer a question, where no offer of proof is made, if the question is of such a nature as to require an offer of proof, in order to advise the court of the competency and relevancy of the question under issue.
5. **Pleading and Proof.** Evidence to prove a defense in the nature of a confession and avoidance is incompetent under a general denial.
6. **Witnesses: OFFER OF PROOF.** Where a question is asked and excluded and an offer of proof made thereunder, the offer, to be competent, must correspond to the question.
7. **Depositions.** Depositions taken in a case pending before a justice and by stipulation used in said case and another pending before said justice, may be used on the trial of both cases in the appellate court, the stipulation in the meantime not having been set aside.

Keens v. Robertson.

8. ———: REVIEW. Where depositions are erroneously read to the jury, but not preserved in the bill of exceptions, this court cannot say that such error was prejudicial.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

The facts are stated by the commissioner.

R. A. Moore, for plaintiff in error:

The agreement is binding. (*State Bank of Nebraska v. Green*, 8 Neb., 307; *McCann v. McLennan*, 3 Neb., 29; *Palmer v. People*, 4 Neb., 76; *Rich v. State Nat. Bank of Lincoln*, 7 Neb., 201.)

Dryden & Main, contra:

The court had power to set aside the stipulation, and that power was properly exercised. (*Porter v. Holt*, 11 S. W. Rep. [Tex.], 494; *McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552; *Ward v. Clay*, 23 Pac. Rep. [Cal.], 50; *Richardson v. Musser*, 54 Cal., 196.)

RAGAN, C.

In the district court of Buffalo county, G. M. Johnston, F. M. Waterhouse, and J. A. Waterhouse sued F. G. Keens to recover \$50 which they alleged in their petition that Keens had agreed to pay them when they should commence the erection of a paper-mill within three miles of the Midway Hotel in the city of Kearney and have on the ground, ready for placing in position, \$20,000 worth of machinery for said paper-mill. F. Y. Robertson was substituted as plaintiff, had a verdict and judgment, and Keens prosecutes to this court a petition in error.

1. On the 23d day of January, 1892, a stipulation was entered into between the parties to the suit, or their counsel, and made a matter of record, that the decision in this case should be the same as that which might be rendered

in the case of Johnson v. Buffalo County National Bank, then pending for trial in said court. On the 26th of January, 1892, counsel for Robertson made application to the court, supported by affidavit, to vacate the agreement just referred to. The grounds upon which he asked to have the agreement vacated were that at the time he became a party thereto he supposed that the case of Johnson against the Buffalo County National Bank would be tried upon the issues on which it was tried before the justice of the peace from whom it had been appealed, and that since making said stipulation counsel for the defendant in the case of Johnson v. Buffalo County National Bank had filed an answer in that case, setting up the defense of *ultra vires*. The court sustained the application to vacate the agreement, and this action of the court is the first error assigned here.

We do not think the court abused its discretion in setting aside this agreement. It is true the agreement was not procured by fraud or sharp practice, and counsel for the defendant in error here may have been somewhat negligent in not providing in the stipulation that the Buffalo County National Bank case should be tried upon the same issues that it was tried in the justice court, but that action, like the one here, was on a subscription to this Kearney paper-mill. Like this one, it had been tried in a justice court, where the answer was perhaps a general denial, if indeed there was any answer at all, and with these facts in his mind, counsel may have been very willing to save the labor, expense, and trouble of trying two cases, the facts and issues being the same. But of course the defense of *ultra vires* was not one which the defendant in this action could interpose, and if the plaintiff should be bound to submit in this case to the same judgment that might be rendered in the bank case, it might work an injustice to him, while the setting aside of the stipulation could not possibly prejudice the defendant in this action. In *McClure v. Heirs*

of *Sheek*, 4 S. W. Rep. [Tex.], 552, before the term of court at which the case was tried, the respective counsel stipulated for the continuance of the case over the term of court about to be held. When the court convened one of the parties employed other counsel and notified opposite counsel that he would not be bound by the agreement and moved the court to vacate the stipulation for continuance on the ground that by a continuance of the case he would likely lose the subject-matter of the action—some cattle. The party making the application also showed the court that he had not consented to the condition since being advised that his counsel had made it, and that he had never authorized his counsel to consent to a continuance. The court set aside the continuance, holding that "Agreements of counsel in regard to the trial of a cause are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion when their enforcement would result in serious injury to one of the parties and the other [party] would not be prejudiced by its being set aside. To the same effect see *Porter v. Holt*, 11 S. W. Rep. [Tex.], 494. In this case the supreme court of Texas held not only that the setting aside of agreements of counsel was generally in the discretion of the district court, but went further, and held that where the agreement affected the substance of the cause of action or the character of the defense and appears to have been made by counsel without a knowledge of all the facts, and that its vacation would not prejudice either party, that the motion to set aside ceased to be a matter of mere discretion, and refusal to set it aside would be error. (See, also, *Ward v. Clay*, 23 Pac. Rep. [Cal.], 50, and cases there cited.)

2. As already stated, this action was originally brought before a justice of the peace. Robertson filed his petition in the district court on the 18th of December, 1889. On the 16th of April, 1892, the court ruled Keens to answer in-

stanter. He did not answer, however, until the 18th of April, and on that date his counsel filed an application for a continuance, which the court overruled. This action of the court is the second error assigned here. The grounds upon which counsel sought to have the court continue this action were that his client was absent in the city of New York; that he had gone to that place with his family on the 8th of April previous. We are of opinion that the district court did not abuse its discretion in refusing this application. The showing made for the continuance did not disclose that Keens ever intended returning to Nebraska. He knew the case was pending when he left, and yet he made no effort to have his deposition taken to be used on the trial. The absence of Keens was not unexpected. He had not been unexpectedly called away because of some emergency. In other words, his application for a continuance not only discloses that he had not used due diligence to be ready for trial, but that he had been grossly negligent. The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense. (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121; *Home Fire Ins. Co. of Omaha v. Johnson*, 43 Neb., 71.)

3. The third assignment of error argued in the brief is that the court erred in refusing to give instruction No. 5 requested by the plaintiff in error. But the plaintiff in error made no objection to this action of the court in his motion for a new trial. He there alleges that the court erred because of its refusal to give instructions Nos. 1, 2, 3, and 4 asked by him, but no mention is made of instruction No. 5. A litigant cannot for the first time object in this court that the district court erred in giving or refusing to give a certain instruction. He must make his complaint of the action of the court in his motion for a new trial in order to have it reviewed here.

4. The fourth assignment of error relates to the action of the district court in refusing to permit a witness called by the plaintiff in error to answer certain questions. All these questions were of such a nature as to require an offer of proof in order that the district court might be advised of their competency and relevancy under the issues. No offers of proof were made by the plaintiff in error on the refusal of the court to permit the witness to answer some of the questions and they need no further notice. One of the questions propounded to the witness was as follows: "State if you made any statement to the subscribers that their money would not be called upon until the full \$8,000 would be raised." This question was objected to, as incompetent and irrelevant. The objection was sustained, and thereupon the plaintiff in error made the following offer: "Defendant offers to prove by this witness that * * * the committee was canvassing this city with a subscription list, agreed with the subscriber, and it was one of the inducements held out to the parties solicited to subscribe that no part of it should be paid until the \$8,000 had been subscribed according to the terms of the agreement. That it was understood and agreed and was represented by said committee * * * that the building was to be a paper-mill, and that it was to be properly constructed; that the machinery was to be placed there in such a position that it would make paper, and be ready for operation, before the money which they subscribed should be called for, and that that was the inducement that caused the subscribers to subscribe." This offer of proof was denied and the plaintiff in error excepted. The answer of the plaintiff in error was, in effect, a general denial, and the evidence offered was incompetent under the pleadings. Another question asked the witness was this: "State in what manner the building differed from the one represented on the plans." Objection having been made and sustained to the witness answering this question, the plaintiff in error

made the following offer: "Defendant offers to show by this witness that a part of the machinery put in this building, claimed as a part of the \$20,000, consisted of engines that were running upon the same shaft, and that one had one-half foot longer stroke than the other and were otherwise inferior and of no use." This offer was denied and the plaintiff in error excepted. The court did not err in excluding this offer, for the reason that the offer did not correspond with the question propounded. The interrogatory refers to the building, the offer of proof was to show that the machinery put in the building was defective.

5. When the above mentioned case of Johnson against the Buffalo County National Bank was pending before the justice of the peace the depositions of certain parties were taken for use in that case; and the counsel in that and this case being the same, it was agreed between them that the depositions in the bank case should be used in this case, and they were so used on the trial before the justice of the peace. The next error assigned is that the district court erred in permitting these depositions to be read in evidence on the trial in this case. The record shows that the depositions were offered in evidence; that they were objected to and the objection overruled, and it is only fair to presume that the depositions were read in evidence to the jury; but if they were, they are not in the bill of exceptions of this record. We cannot say, if the court erred in permitting these depositions to be read, that such error was prejudicial to the plaintiff in error, as we have no means of knowing what the witnesses testified to in their depositions. Furthermore, we are of opinion that these depositions, having been used by consent in the trial of this case before the justice of the peace, it was proper to use them again in the case in the district court if the evidence they contained was material and relevant. (See Code of Civil Procedure, sec. 383.)

The judgment of the district court is

AFFIRMED.

JACOB D. ZITTLE V. SAMUEL SCHLESINGER.

FILED JANUARY 21, 1896. No. 5919.

1. **Trial: NONSUIT: PRACTICE.** Under our code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action. In such case the proper practice is to instruct the jury to return a verdict for the defendant.
2. ———: ———: **HARMLESS ERROR.** But a judgment so entered will not be reversed by this court where, on the evidence, the defendant was entitled to have a verdict directed. In that case the error is without prejudice.
3. **Real Estate Agents: COMMISSIONS: FRAUD.** While a real estate broker is usually entitled to his commissions when he has produced one ready, willing, and able to purchase on the terms proposed by the principal, or when he has produced one with whom a contract of sale is actually made, still, if the person produced is able to purchase only by resort to an unlawful device, the broker has not earned his commission.
4. ———: ———: **VENDOR AND VENDEE: FRAUD.** Where, under such circumstances, an executory contract of sale has been entered into between the principal and the proposed purchaser, the principal being aware that its execution involves the perpetration of a fraud upon a third person and refusing to consummate the contract, the broker is not entitled to his commission.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

The opinion contains a statement of the case.

Slabaugh & Rush, for plaintiff in error:

After the introduction of the evidence by plaintiff, the court has no authority to dismiss the case and discharge the jury without a verdict. (*Dolby v. Tingley*, 9 Neb., 417; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *Chicago, B. & Q. R. Co. v. Richardson*, 28 Neb., 118; *Byrd v. Blessing*, 11 O. St., 362.)

Plaintiff cannot be nonsuited after testimony has been introduced by defendant. (*Lyon v. Sibley*, 32 Me., 576; *Emerson v. Joy*, 34 Me., 347; *Rose v. Learned*, 14 Mass., 154.)

If fraud appears, it is on part of defendant and he cannot take advantage of his own wrong. (*Phelps v. Prusch*, 83 Cal., 626; *Blaydes v. Adams*, 35 Mo. App., 526; *Hannan v. Moran*, 71 Mich., 261.)

If parties to a sale attempt to do wrong it does not affect the agent who is innocent. (*Roundtree v. Smith*, 108 U. S., 269; *Patrick v. Littell*, 36 O. St., 79; *Tracy v. Talmage*, 14 N. Y., 162; *Ormes v. Dauchy*, 45 N. Y. Snp. Ct., 85.)

If parties, having been brought together by the agent, choose to execute a lawful transaction in an unlawful manner, that is a matter which rests wholly with them. (*Michael v. Bacon*, 49 Mo., 474; *Tracy v. Talmage*, 14 N. Y., 162; *Hubbard v. Moore*, 24 La. Ann., 591; *Mahood v. Tealza*, 26 La. Ann., 108.)

An agreement for an exchange was entered into in writing. The sale and purchase were agreed upon and the agent is entitled to his commission. (*Keys v. Johnson*, 68 Pa. St., 42; *Love v. Miller*, 53 Ind., 294; *Francis v. Baker*, 45 Minn., 83; *Love v. Owens*, 31 Mo. App., 501; *Rice v. Mayo*, 107 Mass., 550; *Hamlin v. Schulte*, 34 Minn., 534.)

A broker is not an insurer of title and may recover his commission though the title is defective. (*Birmingham Land & Loan Co. v. Thompson*, 86 Ala., 146; *Doty v. Miller*, 43 Barb. [N. Y.], 529.)

IRVINE, C.

This was an action by the plaintiff in error against the defendant in error to recover commissions which the plaintiff claimed he had earned as a real estate broker. When the plaintiff rested, the defendant moved for a nonsuit. This

motion was sustained by the court, and a judgment of dismissal entered, against the plaintiff's exception, without taking a verdict from the jury. It is contended that under our code this was improper practice, and we shall examine that question before inquiring into the merits of the case.

It is broadly contended that the court has no power to subject the plaintiff to an involuntary nonsuit or to enter a judgment of dismissal on the ground that the plaintiff's evidence is insufficient to establish a cause of action. Were we without guide from the statutes, the question would upon authority be difficult of solution. The supreme court of the United States (*Elmore v. Grymes*, 1 Pet., 469) has determined that the federal courts have no power to subject the plaintiff to an involuntary nonsuit. Many of the state courts take the same view. On the other hand, in many states such a practice has been sustained as avoiding an unnecessarily circuitous procedure. (See authorities collated, 16 Am. & Eng. Ency. of Law, 733.) But the provisions of our Code of Civil Procedure, to our minds, afford a ready solution of the question. Section 430 provides: "An action may be dismissed without prejudice to a future action. First—By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. Second—By the court, where the plaintiff fails to appear on the trial. Third—By the court, for want of necessary parties. Fourth—By the court, on the application of some of the defendants where there are others whom the plaintiff fails to prosecute with diligence. Fifth—By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the action, the decision must be upon the merits." By virtue of this section, in the five cases stated, a judgment of dismissal without prejudice may be entered by the court; and by the last sentence of the section such a judgment cannot be entered in other cases. At common law a nonsuit was not a bar to a future action, and the evi-

dent purpose of the framers of the code was to change the law in order to lead every case to a final judgment which should be a bar except where, for sufficient reasons, other provision has been made. This is the view taken elsewhere under similar statutes. (*Byrd v. Blessing*, 11 O. St., 362; *Case v. Hannahs*, 2 Kan., 490; *Mulhern v. Union P. R. Co.*, 2 Wyo., 465.) Where the evidence is insufficient to warrant a verdict for the plaintiff the court may, and should, instruct the jury to return a verdict for the defendant; but it has no authority without a verdict to enter a nonsuit and judgment of dismissal. It does not follow, however, that this judgment should be reversed because of this error. Section 145 of the Code provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." It follows that if the state of the evidence was such that the court should have directed a verdict for the defendant and entered judgment upon that verdict, the error is without prejudice and must be disregarded. (*Byrd v. Blessing* and *Case v. Hannahs*, *supra*.)

The evidence tends to show that the plaintiff, a real estate broker, had entered into a contract with one Mills to procure for him a purchaser, either by way of sale or exchange, for certain property in the city of Omaha. In the language of real estate brokers, Mills had "listed" his property with the plaintiffs for sale or exchange. Some time thereafter the defendant approached plaintiff to ascertain what property plaintiff had for exchange. He was informed of Mills' property, and the defendant then listed his property with the plaintiff, knowing, it was alleged, that plaintiff was to receive a commission from Mills, and agreeing with that knowledge to himself pay to plaintiff one-half the usual commission. This arrangement having been made, the plaintiff and defendant went to examine

Mills' property. They were met by Mrs. Mills, who refused to permit them to enter. Returning, they met Mills, who was introduced to defendant by plaintiff, plaintiff informing Mills where they had been, their object, and how it had been defeated. They were then informed by Mills that Mrs. Mills was unwilling to dispose of the property, but that she had joined in a conveyance to one Miller, and that a reconveyance from Miller to Mills was then held in escrow. Mills proposed to obviate the difficulty arising from Mrs. Mills' unwillingness to convey, by destroying the reconveyance and causing Miller to convey directly to the defendant. Subsequently a memorandum of agreement was signed by Mills and the defendant, but defendant refused to perform it, giving as a reason that he had taken counsel and learned the title would not be good, and that he did not wish the property. The record does not disclose the actual condition of the title, except that there had been a conveyance from Mills and wife to Miller, which it would seem from some of the evidence was for the purpose of securing a debt; that Miller had executed a reconveyance, and that that reconveyance had not been delivered, but was in possession of one Wakefield, and held by him as security for the payment of other moneys. Under this evidence, had plaintiff produced a purchaser willing and able to take defendant's property? We think not. In the first place, assuming the title to have been in Mills, Mills did not offer a valid conveyance to defendant. It is true that the defendant was aware of this when he entered into the written memorandum. But the method proposed for making title was plainly a device to defraud Mrs. Mills of her dower if not also of homestead rights. The plaintiff was cognizant of this device and of its purpose. Had the transaction been completed, Mrs. Mills would have had her remedy against the defendant who was also a party to the fraud; and while the defendant can claim no relief because of his participation in such an unlawful transaction, he was not bound to

consummate it. He had a right, which he exercised, to refuse to consummate the fraud, and Mills being unable to confer upon him even the apparent title, except through such fraudulent device, he was not a purchaser able to take the property in a lawful way. He was merely one willing to purchase by unlawful means. A production of such a purchaser does not entitle the agent to his commission. The greater part of the argument on behalf of plaintiff is addressed to propositions which assume that a person willing and able to take the property had been procured. We are cited to certain cases holding that a broker may recover his commission although the title proves defective, and that the refusal of a wife to join in a conveyance is no bar to the recovery of commissions; but the defects and refusal referred to in those cases relate to the title to the principals' land, and not to such features with relation to land offered in exchange therefor. In the case of an exchange a defect in title to the land offered in exchange is as good a defense as would be proof that the purchaser produced had no means of buying except with counterfeit money. But we have taken a view very favorable to the plaintiff in assuming that title had been shown in Mills. This court has held that where a deed absolute in form is executed to secure a debt, the case is different from an ordinary mortgage, and title passes to the grantee. (*Gallagher v. Giddings*, 33 Neb., 222.) Such a conveyance had been made to Miller, and while a reconveyance had been executed, it had not been delivered, but had been placed in escrow as security for a further debt. The details of these transactions very meagerly appeared in evidence. It is unnecessary to consider where the legal title was reposed. It is sufficient that if the legal title were not outstanding there were substantial outstanding equities which Mills did not propose to divest in a regular or legal manner. The evidence was, therefore, of such a character that a verdict should have been directed

School District v. Bishop.

for the defendant, and the error in the former proceedings was not prejudicial.

JUDGMENT AFFIRMED.

SCHOOL DISTRICT NUMBER ONE OF HARLAN COUNTY
V. HARRY O. BISHOP ET AL.

FILED JANUARY 21, 1896. No. 5975.

1. **Findings of Referee: REVIEW.** Findings of fact reported by a referee stand in the same position as the verdict of a jury; and in reviewing the action of a district court in setting aside such a report, the same rules will be observed as in reviewing an order setting aside a verdict.
2. **Ruling on Motion for New Trial: REVIEW.** The granting of a new trial is largely within the discretion of the trial court. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.
3. **Reference: FINDINGS: ORDER SETTING ASIDE REPORT: REVIEW.** Where an action at law has been referred, this court will not reverse an order of the trial court setting aside the referee's report and allowing a new trial, when the referee failed to report any finding on material issues presented by the pleadings.
4. **Court Records: CORRECTIONS.** A court of record has the inherent authority to amend its records so as to make them conform to the facts. This power extends as well to supplying omissions as to correcting mistakes, and in the exercise of the power the court is not confined to an examination of the judge's minutes or other written evidence; it may proceed upon any satisfactory evidence.
5. **Continuance: DISMISSAL: REVIEW: BILL OF EXCEPTIONS.** A record disclosing a stipulation for the continuance of a cause and a peremptory order of the court dismissing it at the same term, the judgment of dismissal cannot be reviewed in the absence of a bill of exceptions or matter of record disclosing the grounds of the court's action.

ERROR from the district court of Harlan county. Tried below before GASLIN, J.

James McNeny, for plaintiff in error.

C. C. Flansburg, *contra*.

IRVINE, C.

The history of this case has been somewhat eventful, and its result is to present to us now for review questions of practice rather than questions of substantive law. The action was begun by the school district to recover damages upon a bond alleged to have been executed by Henry O. Bishop as principal and the other defendants as sureties, conditioned for the faithful performance of a contract whereby Bishop undertook to construct for the school district a certain schoolhouse, it being alleged that the contract provided that Bishop should assume all risk of losses by fire, water, or accident during the progress of the work, and deliver to the school district the building complete at a time specified. The breach alleged was that while the work was in progress a violent wind-storm occurred, destroying the building, and that Bishop had failed and refused to replace it, to the plaintiff's damage. An answer and a reply were filed presenting a number of issues for trial. In June, 1888, an order was made referring the case to a referee to hear and determine the facts and report his findings on the first day of the following term of court. It does not appear whether or not this order of reference was made by consent of the parties, but no exception was taken thereto, so the question is immaterial so far as the validity of the order is concerned. Subsequently an order was made extending the time for report. This order was made October 16, 1888, and directed the referee to report on the first day of the next term of court. The record presents some question as to whether the report was filed within time. It was filed December 27, 1888, and the record being silent as to the dates when the different terms were held, it must be presumed that the report was filed

within time. The result of the report so filed was to find due to the plaintiff from all the defendants except Henrietta Bishop the sum of \$4,160.49, and to discharge the defendant Henrietta Bishop. A motion was filed to confirm this report on the part of the plaintiff, while the defendants filed exceptions thereto, and a motion to set it aside and for a new trial. The latter motion was sustained February 16, 1889, the plaintiff excepting to the court's ruling. The case was then continued from term to term for different reasons until October, 1891. In that month there was filed a stipulation of counsel agreeing to a continuance of the cause over the November, 1891, term; but an order appears at that term reciting that the cause came on to be heard and that it was dismissed at plaintiff's costs over an exception by the plaintiff to that ruling. Six days later a motion was filed by the plaintiff to reinstate the cause; but no entry was made at that term of any order on the motion to reinstate. In February, 1892, another judge presiding, the motion to reinstate was called up, whereupon the court on motion of two of the defendants entered a *nunc pro tunc* order, finding that on the 5th day of December, 1891, the motion to reinstate had by the former judge been overruled and that the plaintiff had then excepted to that ruling, and directing the clerk to reform the record accordingly. Bills of exceptions were settled preserving the evidence on the hearing of February, 1892; but there is no bill of exceptions disclosing the evidence or proceedings of the November term, 1891. On this record the plaintiff prosecutes proceedings in error, his petition containing a number of assignments of error, which may, however, be reduced to three general assignments: First, the setting aside of the referee's report; second, the dismissal of the case in December, 1891; third, the making of the order of February, 1892, *nunc pro tunc*, showing the overruling of the motion to reinstate in December, 1891.

An examination of the Code of Civil Procedure, and of

the decisions of this court thereunder, shows that where a case is referred, the findings of fact by the referee stand in the same position as the verdict of a jury, and may be confirmed and judgment entered thereon, or may be set aside on a motion for a new trial in conformity with the practice in other cases. (Code of Civil Procedure, art. 4 and art. 6; *Simpson v. Gregg*, 5 Neb., 237; *Light v. Kennard*, 11 Neb., 129; *Brown v. O'Brien*, 4 Neb., 195.) Therefore, in considering whether or not there was error in the action of the district court in setting aside the referee's report, we should proceed in the same manner as if there had been a trial by jury and verdict similar to the report of the referee, and a motion for a new trial sustained. While the limitations upon the power of this court to review the action of a district court in granting a new trial have not yet been very distinctly defined, the adjudications have gone far enough to establish these rules: That in granting a new trial a district court has a large discretionary power; it is not confined to a strict consideration of the specific grounds urged in the motion, but may, for manifest error in the proceedings, of its own motion, in the interest of a proper administration of justice, set aside a verdict and allow a new trial; and, therefore, where a new trial has been allowed, a much stronger showing must be made against the ruling of the court to procure a reversal, than where a new trial has been denied. The action of the court will not be reviewed except for abuse of discretion. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Bigler v. Baker*, 40 Neb., 325; *Weber v. Kirkendall*, 44 Neb., 766.) Examining this record with a view to the rule so established, and not merely upon a technical consideration of the reasons assigned in the motion for a new trial, we find that the sureties on the building bond averred in their answer that after the building had been blown down the plaintiff had permitted strangers to remove and convert to their own use building material to the value of \$2,500; that they had signed the bond upon condition that

before its delivery one Mullalley should sign the same, and that this condition was known to the plaintiff, and that after the execution of the bond material changes had been made in the building contract, the performance of which it had been given to secure, without the consent of the sureties. The last defense is averred in general language, but is probably sufficiently pleaded unless attacked by motion, which was not done. On none of these issues did the referee make any finding, and there was no general finding. It has been said that where the referee fails to find certain issues the proper practice is to refer the case back with directions to make a finding. (*State v. Graham*, 23 Neb., 68.) But this was said in an original action in the nature of *quo warranto* in this court, and not in a case like this—an ordinary action at law. It has also, we believe, been the practice, where an equity case has been referred and the findings of the referee vacated, for the court itself to make findings on the evidence reported by the referee; and this practice we do not wish to be understood as disapproving. The case before us is, however, an action at law where a jury trial is demandable of right. It could not be referred except by consent of the parties (Code of Civil Procedure, secs. 298, 299), and the record showing no objection, consent is presumed. (*Hosford v. Stone*, 6 Neb., 378.) But the case being one not referable except by consent, if the court did not find the report such as to warrant the entry of judgment thereon, we do not think it was any abuse of discretion to set it aside absolutely and award a new trial, although we would not say that that was the only proper practice. It is stated in one of the briefs that the report was in fact set aside because the bill of exceptions was not complete. This statement is not, however, borne out by the record, which shows that it was set aside "for the reasons stated" in the motion, which included most of the causes authorized for a motion for a new trial. We cannot, therefore, from the record, tell upon which one the

court proceeded, and having found one reason justifying its action it will not be disturbed.

We are thus brought to the proceedings of 1891 and 1892. It is strenuously argued that the *nunc pro tunc* order was erroneous, not because it was not entered in accordance with the facts, but because it was made on oral testimony alone, without any support from the judge's minutes, the files, or other entries of record; and cases are cited which hold that a *nunc pro tunc* order for the purpose of supplying the record must be based on some entry and cannot be made to depend upon oral testimony. We think that the weight of authority is now contrary to this view; and that the action of the court was fully warranted by our own decisions. In *Garrison v. People*, 6 Neb., 274, a criminal case, the record failed to show the finding of the indictment, and at a subsequent term of the court a *nunc pro tunc* order was entered supplying this defect. This action was sustained, the court holding that a court of record has authority to make an entry as of the date when it should have been made, to conform to the facts; and that "this may be done upon the judge's notes or any other satisfactory evidence." In *Sullivan Savings Institution v. Clark*, 12 Neb., 578, it was held that the judge's minutes are *prima facie* evidence of the proceedings, but may be shown to differ from the judgment actually rendered. *Brownlee v. Davidson*, 28 Neb., 785, and *Hoagland v. Way*, 35 Neb., 387, also assert the full power of the court to amend its record to conform to the facts. Of the propriety of this rule we have not the slightest doubt. The record when made up imports absolute verity. In collateral proceedings and for purposes of review in this court, it is unimpeachable. This is an elementary rule which we have had frequent occasion to enforce. Its existence is of itself a sufficient reason for sustaining the power of the court making the record to see that it becomes in fact what it is in law—an absolutely truthful record of what in fact oc-

School District v. Bishop.

curred; and while a court should on application to correct the record proceed with caution for the purpose of insuring verity, it is not confined to any one class of evidence, but, in the language of the first case cited, may proceed upon any satisfactory evidence. There was, therefore, no error in making the *nunc pro tunc* order. Nor can we say that there was error in the judgment of dismissal or in refusing to reinstate the case thereafter. We do not know from the record why the court took this course. It is true there was a stipulation for a continuance, but this stipulation may have been waived. It may have been vacated for good cause. (*McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552.) We have no bill of exceptions showing either the existence or absence of such cause. It is true that there is in the record a bill of exceptions embodying the evidence on the motion to reinstate when called up in February, 1892; but this motion was then properly overruled by the judge on ascertaining that the same motion had been passed upon at a former term—in other words, that it was no longer pending. We are not even prepared to say that the rights of other litigants may not justify a court in summarily dismissing a case for want of prosecution, in spite of such a stipulation, where it has stood term after term upon the docket without progressive action and an impediment to other business of the court. But we do not hold that this was such a case. We sustain the judgment of dismissal upon the ground that the record does not disclose the evidence upon which it was based, and error does not appear.

JUDGMENT AFFIRMED.

RAGAN, C., not sitting.

WILLIAM D. FARRIS ET AL. V. STATE OF NEBRASKA,
EX REL. JOHN MURPHY.

FILED JANUARY 21, 1896. NO. 7368.

1. **Review:** SUFFICIENCY OF PLEADINGS. In error proceedings this court will, on proper assignments of error, review a record to ascertain whether the pleadings support the judgment rendered by the district court, although there was in that court no motion for a new trial.
2. **Mandamus.** A writ of *mandamus* will not issue where it is not within the power of the respondents lawfully to perform the act sought to be enforced, or where the writ would otherwise be unavailing.
3. ———. Accordingly where an administrative board is charged with the duty of performing several acts involving expenditures, and there are no funds available sufficient to permit the performance of all, courts will not ordinarily by *mandamus* direct the board which act to perform and which to leave unperformed.

ERROR from the district court of Saunders county. Tried below before BATES, J.

E. F. Gray, for plaintiffs in error.

John H. Barry and *H. Gilkeson*, *contra*.

IRVINE, C.

Murphy, a resident taxpayer and parent of children of school age in school district No. 34 of Saunders county, applied to the district court for a writ of *mandamus* against the members of the district board to require them to purchase and lend to the pupils of the school the necessary text-books for the pursuance of a course of study therein. A peremptory writ of *mandamus* was allowed by the district court, and the respondents bring the case here for review by petition in error.

Farris v. State.

The relator claimed a right to the writ under chapter 46, Session Laws of 1891, entitled "An act to provide cheaper text-books and for district ownership of the same." (Session Laws, 1891, p. 334, ch. 46.) By the terms of this act, district school boards are empowered, and it is made their duty, to purchase all text-books necessary for the schools of such district, and they are authorized to enter into contracts with publishers for the purchase of such books. The details of the act are not essential to a decision of this case.

A question of practice must be disposed of before the merits of the case are reached. The case was tried in the district court on the application for the writ, and an answer and a reply thereto, and was determined upon the pleadings and upon evidence adduced. There is no bill of exceptions, nor was there filed any motion for a new trial. On this state of the record the relator contends that this court can only inquire into the case for the purpose of ascertaining whether the application stated a cause of action, while the respondents contend that all the pleadings can be examined for the purpose of ascertaining whether the judgment rendered could properly be rendered on such pleadings. We concur in the latter view. In numerous cases it has been held that rulings made on the trial of a case cannot be reviewed on error unless the record discloses that a motion for a new trial was made in the district court and a ruling obtained thereon. But it has likewise been held that where a case tried before a justice of the peace has been taken to the district court by proceedings in error, a motion for a new trial in that court is not necessary to obtain a review of its judgment here. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527; *Dreyfus v. Moline, Milburn & Stoddard Co.*, 43 Neb., 233.) In *Newlove v. Woodward* the reason is given that the matters presented to the district court were purely questions of law; and in *Leach v. Sutphen* it is said that a motion for a new trial is only

necessary where questions of fact are tried and determined. In *O'Donohue v. Hendrix*, 13 Neb., 255, it was held that a motion for a new trial is only necessary where a trial has been had, and that if the court has merely construed the pleadings, or some of them, no motion for a new trial is necessary. The logic of this case would apply as well to a case where there was in fact a trial, but where the assignments of error relate only to matters involving a construction of the pleadings. We think the rule deducible from all the cases is that a motion for a new trial is necessary in all cases in order to obtain a review of any rulings made in the course of, or in connection with, the trial of the case. But as such a motion only calls to the attention of the court the proceedings on the trial, it is not necessary for the purpose of obtaining a review of questions not connected with the trial, but arising independently thereof. If, as has been held, the question of the sufficiency of a petition to state a cause of action may be raised at any time (*Thomas v. Franklin*, 42 Neb., 310), and if a motion for a new trial is not necessary to raise that question (*Schmid v. Schmid*, 37 Neb., 629), it is clear that such a motion is not necessary to raise the question as to whether the pleadings support the judgment rendered. We therefore deem this question open for review.

The relator argues, among other things, that the act of 1891, above referred to, is unconstitutional; but this question we do not decide, for the reason that, assuming its constitutionality, we think that under the pleadings the writ should have been denied. In the application there is a general averment that "the school district has at the present time money levied and on hand whereby said books and supplies may be purchased and paid for." The answer denies this averment, but it will be observed that the averment is not broad enough to show that there were moneys available for such purpose in excess of prior obligations of the district. The application was made Sep-

tember 17, 1894, and the answer avers specifically that of the taxes for 1893 there remained unpaid only \$6.56; that at the annual school meeting held in June, 1894, there was voted a tax of one mill to pay interest on bonds, all of which would be necessary for that purpose, and also a tax of six mills, nominally for a building fund, but intended to be used to pay teachers, fuel bills, and incidental expenses, and that no other tax had been voted or levied; that the assessed valuation of the district was \$28,860, whereunder the six-mill tax would yield only \$173.16; that the state apportionment made in June, 1894, was \$70.62, all of which had been paid out; that the money in the hands of the county treasurer to the credit of the district was \$14.95; that the money in the hands of the district treasurer was \$47.40, \$30 of which had been drawn against, but not yet paid, and that the state apportionment to be made in June, 1895, would be \$67.76; that these items constituted the entire resources of the district, and that against such resources the district had contracted to pay a teacher the sum of \$280; that the expense for fuel would be \$68, and for cleaning and repairs not less than \$10; that no tax had been voted or appropriation made to buy text-books, but on the contrary a proposition to make a levy for such purpose had at the annual meeting been defeated; that there were in the district attending school fifty-five pupils, and that to supply them with text-books would cost \$2 each. The reply denies that there were fifty-five pupils, and alleges that there were but thirty-two, and that it would cost only \$1 per pupil to furnish books. It also denies that fuel would cost \$68, but does not allege what it would cost. The reply contains no other denial. It is unnecessary to consider whether any part of the six-mill levy for building purposes could be devoted to text-books. It is very clear that no portion of the state apportionment could be appropriated to any other purpose than the payment of teachers' wages. (Compiled Statutes, sec. 8, ch. 79, sub. 5.) In any

view of the resources of the district as disclosed by the pleadings, it is perfectly clear that there were no funds available after paying salary of teacher, fuel bills, and necessary incidentals wherewith to buy text-books. If the act of 1891 be in all respects valid, and if it be mandatory in requiring the purchase of text-books, still no writ should issue in this case. A writ of *mandamus* will not issue where it is not within the power of the respondents lawfully to comply therewith, or where it would otherwise be unavailing. Where an administrative board is confronted with the duty of performing several acts involving expenditures, and there are no funds available sufficient to permit the performance of all, some duty must be left unperformed, and ordinarily the courts will not by *mandamus* direct the board which one it shall perform and which leave unperformed. (See *Young v. Lane*, 43 Neb., 812.)

REVERSED AND REMANDED.

CITY NATIONAL BANK OF HASTINGS V. JOSEPH
THOMAS, TRUSTEE.

FILED JANUARY 21, 1896. No. 8050.

1. **Bill of Exceptions.** When a bill of exceptions has been quashed it cannot be afterwards considered for any purpose in the case. *Jones v. Wolfe*, 42 Neb., 272, followed.
2. **Review Without Bill of Exceptions: INSTRUCTIONS.** In reviewing a judgment on petition in error without a bill of exceptions this court is necessarily confined in an examination of instructions to an inquiry whether the instructions given could under any circumstances be properly given under the pleadings. The refusal of instructions cannot be reviewed.
3. **Instructions: HARMLESS ERROR.** The repetition of a proposition of law in the court's charge is not reversible error unless

City Nat. Bank of Hastings v. Thomas.

it be made to appear that the defeated party was prejudiced thereby.

4. **Estoppel: PLEADING.** A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom.
5. **Negotiable Instruments: POSSESSION: EVIDENCE.** Possession of instruments negotiable by delivery is *prima facie* evidence of ownership.
6. **Banks and Banking: GUARANTY BY PRESIDENT: NEGOTIABLE INSTRUMENTS.** A person purchasing negotiable paper from the president of a bank, with a guaranty of payment executed by the president, is justified in relying on the president's representation that the paper belonged to the bank, and the bank is bound by his representation to that effect, at least where the transaction occurred in the banking house, and while the president was apparently engaged in performing his duties as such officer.
7. **Instructions: REVIEW.** Certain instructions examined, and held not erroneous as applied to the case under consideration.

ERROR from the district court of Adams county. Tried below before BEALL, J.

M. A. Hartigan, for plaintiff in error.

Capps & Stevens, contra.

IRVINE, C.

This case was before the court in 1894 and the judgment of the district court therein was reversed. (*Thomas v. City Nat. Bank of Hastings*, 40 Neb., 501.) On a new trial in the district court there was a verdict followed by judgment for the plaintiff. This judgment the bank seeks to reverse. The former report of the case contains a sufficient statement of the facts, except, perhaps, as to some minor features which will be mentioned in the course of the opinion.

The report contains what purports to be a bill of exceptions; but this was, on motion of Thomas, quashed at the

last term of court. The bank contends that, notwithstanding this order, on the authority of *Scott v. Waldeck*, 11 Neb., 525, and *City of Seward v. Klenk*, 27 Neb., 615, and 30 Neb., 775, we may still look into this bill of exceptions for the purpose of ascertaining whether the verdict is supported by the evidence. Such a practice is, however, contrary to reason, and has for a long time been rejected by this court. The case of *Jones v. Wolfe*, 42 Neb., 272, distinctly disapproves of the rule stated in the cases cited, and must be taken as definitively establishing the doctrine that when a bill of exceptions has been quashed it can be no further considered for any purpose. There being now no bill of exceptions, none of the assignments of error is open for consideration, which, for examination, requires the existence of such a bill. The petition in error contains no assignments other than these, except those relating to the instructions. Of these it is obvious that we cannot consider those relating to the refusal of instructions, because no matter how clearly correct such instructions may be as abstract statements of law, their refusal was proper unless they were applicable to the evidence adduced; and whether or not they were so applicable we cannot determine without a bill of exceptions. Furthermore, in examining the instructions given, in the absence of a bill of exceptions we must presume that they were applicable to the evidence, and could only reverse the judgment for error in giving instructions, if such instructions could not, under any circumstances under the pleadings, be otherwise than prejudicially erroneous. We therefore confine our examination of the case to the limits stated.

The charge of the district court was very long. The instructions were evidently prepared and requested by counsel. It followed that several instructions, stating in substance the same proposition of law, but in varying language, having been submitted, the court in several instances gave the whole group of such instructions, so that the

City Nat. Bank of Hastings v. Thomas.

charge is open to the criticism of unnecessarily reiterating the same general proposition, and it is attacked for that reason. It has, however, been established that the repetition of a proposition of law in several instructions is not reversible error unless it be made to appear that the fact of such repetition was prejudicial to the defeated party. (*Hill v. State*, 42 Neb., 503; *Carleton v. State*, 43 Neb., 373; *Gran v. Houston*, 45 Neb., 813.) We think this case falls within the rule stated. It will be unnecessary to quote at length each of the instructions which the bank attacks. Attack is not made upon the form of language employed, but upon the proposition of law submitted; and we shall, for the most part, consider those propositions without reference to the specific instruction or instructions in which they were embodied.

One of the defenses was that the notes sued on were secured by mortgage and that another action was pending to foreclose the mortgage. By one of the instructions the jury was told that both remedies might be pursued at the same time. This as a general abstract statement of law would be incorrect (*Meehan v. First Nat. Bank of Fairfield*, 44 Neb., 213); but we cannot learn without a bill of exceptions whether the proof showed a state of affairs within the rule announced in the case cited, or even whether there was any proof in support of the plea. Error, therefore, much less prejudicial error, does not appear.

In several of the instructions the jury was told that if certain other facts, not necessary to here mention, should be found, then the plaintiff might recover, although Bostwick, the president of the bank, had converted the proceeds of the sale of the notes to his own use, and had thereby defrauded the bank. These instructions are attacked on the ground that the bank had pleaded no such matter in defense, and that the instructions were, therefore, not within the issues. But many things may develop on the trial not directly pertinent to the issues, and which a jury

might consider pertinent in the absence of an instruction that they should be disregarded. In such cases it is proper for the trial court to direct the jury to disregard such matters. For all that appears from the record these instructions were of this character.

The fourth instruction was to the effect that if on or about May 10, 1889, the bank purchased from Paul the notes in action and placed to Paul's credit the sum of \$9,525 in payment for said notes, and if, on or about May 18, the bank sold said notes to the plaintiff for \$10,300, paid by plaintiff to the bank, and the bank retained for its own use \$775 of said money, then the verdict should be for the plaintiff. The objection urged to this instruction is that it held the bank liable for the whole amount of the notes, provided the jury found that it received the benefit of \$775 only; but in view of the issues the instruction was correct. The plaintiff alleged a sale of the notes by Paul to the bank and a resale with contract of guaranty by the bank to the plaintiff. One of the defenses was that the bank never owned the notes; that they were not sold by the bank, but by Bostwick, for the benefit of himself and others, and that Bostwick had no authority to execute the guaranty. When we read this instruction we find it told the jury that if the bank bought the notes and paid Paul \$9,525 therefor, or rather by credit on his account became his debtor for that sum, and if it then sold the notes for \$10,300, and retained for its own use \$775, which was the difference between the purchase and selling price, it was liable. We must assume that the evidence warranted an instruction restricting the inquiry to this class of facts; and if so, such a transaction would, under the former opinion in this case, be a ratification of Bostwick's act and charge the bank upon the guaranty. The amount of profit realized by the transaction would not affect the liability. Closely allied to the question just considered is the contention that some of the instructions are erroneous in sub-

mitting a question of estoppel to the jury when none was pleaded. What counsel conceive to present a case of estoppel grows out of the facts referred to in the instruction last criticised, and also out of the fact that the bank had made Bostwick its president and clothed him with apparent authority to make the contract sued on. It is not true that in all cases to be available an estoppel must be strictly pleaded as such. The rule is that where the pleadings present the opportunity the particular facts relied on as constituting an estoppel must be pleaded. All these facts are pleaded, and we think the plaintiff is entitled to the benefit of the law arising therefrom, although he did not by reply collate them anew and replead them avowedly by way of estoppel.

In two instructions the jury was told that the authority of Bostwick to execute the guaranty was conclusively presumed, and this statement is attacked. It was held on the former hearing that the authority of the president to execute the guaranty would be conclusively presumed in favor of a purchaser without notice to the contrary. This rule was laid down with reference to the facts of the case, and was derived from *People's Bank of Belleville v. Manufacturers Nat. Bank*, 101 U. S., 181. In both of the instructions given the general statement attacked was coupled with other elements confining the rule within the limit stated in the former opinion, and it was therefore not erroneous.

The jury was instructed that possession of negotiable instruments is *prima facie* evidence of ownership. In another instruction this was qualified with the further requirement that such instruments should be in form negotiable by delivery. These statements were made in connection with instructions in regard to plaintiff's right to presume that the bank was the owner of the paper. It is settled that in an action upon an instrument negotiable by delivery, possession is *prima facie* evidence of ownership

(*McDonald v. Aufdengarten*, 41 Neb., 40), and the purchaser of paper is certainly warranted in acting upon evidence which is sufficient in a court of justice.

Another statement in the instructions, two or three times repeated, calls for closer examination. It is, in effect, that although the notes were not the property of the bank, plaintiff may recover, provided Bostwick, the president of the bank, represented that the bank owned the notes, if the plaintiff bought them relying on that representation and remitted the purchase money to the bank. The bank had no authority to guaranty the payment of the paper except in course of its banking business. It had no authority to execute such a guaranty for the accommodation merely of others. It had authority to buy commercial paper and sell it; and in connection with the sale to guaranty its payment. (*Thomas v. City National Bank of Hastings*, *supra*.) The argument is that while Bostwick might bind the bank, although without special authority so to do, in dealing with the bank's property, he could not bind the bank by contracts made in its name on matters not connected with its business; and that his representation and declarations were not sufficient in a particular transaction to establish the fact that that transaction was on behalf of the bank, and that its subject-matter was the bank's property, nor were they sufficient to justify the plaintiff in believing so. This question is by no means new, and has not met an entirely uniform solution by the courts; but we take it that the better doctrine is that in such a case, where one of two innocent persons must suffer through the misfeasance of the agent of one, that one who has placed the agent in a position to perpetrate the fraud must suffer. This general rule will hardly be controverted. (*Hern v. Nichols*, 1 Salk. [Eng.], 289, and many other cases.) It has been applied to cases like the present. Thus, in *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis., 663, the case was very much like that before us, and the court held the bank bound by the repre-

Haubrock v. Loeb.

sensation of the cashier indorsing the paper, that it belonged to the bank. *North River Bank v. Aymar*, 3 Hill [N. Y.], 262, and *Bank of Genesee v. Patchin Bank*, 19 N. Y., 312, are equally in point, while the same principle is recognized, but under more different facts, in *Farmers & Mechanics Bank v. Butchers & Drovers Bank*, 14 N. Y., 623, 16 N. Y., 125; *City Bank of New Haven v. Perkin*, 29 N. Y., 554; *Bank of State of New York v. Bank of the State of Ohio*, 29 N. Y., 619. The principle is also impliedly recognized in *West St. Louis Savings Bank v. Parmelee*, 3 Dill. [U. S.], 403, 95 U. S., 557, although in the last case the bank was held not liable, because from the form of the note and from facts within plaintiff's knowledge he was charged with notice that the paper was that of the cashier and not that of the bank. It may be that the representations of the president at all times and at all places would not bind the bank upon this question; but again we must indulge the presumption in favor of the correctness of the instruction. If the representations were made in the banking house while the president was apparently engaged in performing his duties as such officer, we have no doubt that the plaintiff was justified in relying on his representation so made that the bank owned the note.

No other arguments are advanced calling for special notice here.

JUDGMENT AFFIRMED.

EDWARD HAUBROCK ET AL. V. ABRAHAM LOEB.

FILED JANUARY 22, 1896. No. 5991.

Conflicting Evidence: REVIEW. When the record presents questions of fact only, as to which the evidence is conflicting, and apparently evenly balanced, a verdict or finding based thereon will not be disturbed by this court.

ERROR from the district court of Adams county. Tried below before BEALL, J.

A. H. Bowen, for plaintiffs in error.

Capps & Stevens, contra.

Post, C. J.

This action originated before a justice of the peace for Adams county, where the defendant in error sued to recover upon a note alleged to have been executed by the defendants below, plaintiffs in error, to one George S. Clute. It was from thence taken by appeal to the district court for said county, where a trial was had, resulting in a verdict and judgment for the plaintiff therein, and which it sought to reverse by means of this proceeding. In the petition below is alleged the execution of the note and the purchase thereof by the plaintiff, for value, before maturity in the usual course of business. The answer is a general denial. The judgment is assailed in this court upon the sole ground that the evidence fails to establish the execution of the note sued on.

Two witnesses, Clute, the payee above named, and one Bickford, testified positively to the signing and delivering of the note in their presence, and were to some extent corroborated by the witnesses Hamen and Slaker, who identified the disputed signatures as genuine from personal acquaintance with the writing of the defendants, and also from comparison with their acknowledged signatures. The defendants on the other hand denied the execution of the note, but admitted the signing of some paper at the time to which reference was made by the plaintiff's witnesses. The finding of the jury, based upon the conflicting evidence above stated, must, in this proceeding, be regarded as conclusive. The rule which governs in like controversies has been

Omaha Loan & Trust Co. v. Hanson.

many times asserted by this court and is fittingly illustrated by the case at bar. We discover no error in the record and the judgment is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLANT, V.
LARS HANSON ET AL., APPELLEES.

FILED JANUARY 22, 1896. No. 6941.

1. **Usury.** Where by the terms of a promissory note it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty.
2. **Interest.** It is the duty of the court in computing the amount due on such an instrument to allow interest until maturity at the lower rate and thereafter at the higher rate.

APPEAL from the district court of Douglas county.
Heard below before WALTON, J.

Francis A. Brogan, for appellant.

J. W. Rogers, contra.

POST, C. J.

This is an appeal from a decree of the district court for Douglas county, the only question presented by the record being the validity of a provision of a promissory note for the payment of interest at six per cent per annum until maturity, and at a rate of ten per cent thereafter. The identical question was considered in *Havemeyer v. Paul*, 45 Neb., 373, in which, overruling *Richardson v. Campbell*, 34 Neb., 181, the validity of the foregoing provision was sustained. The decree of the district court will accordingly

McKinney v. Hopwood.

be reversed and the cause remanded, with directions to compute interest in accordance with the rule herein approved.

REVERSED.

ALBERT E. MCKINNEY ET AL. V. E. L. HOPWOOD.

FILED JANUARY 22, 1896. NO. 5987.

Directing Verdict: NEGOTIABLE INSTRUMENTS: CONSIDERATION: SURETYSHIP: LIABILITY OF MARRIED WOMAN. Where the evidence in a case is such that had a finding been made thereon by the jury for plaintiff, it would have been sufficiently sustained, it is error for the court to direct a verdict for defendant.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

R. A. Moore, for plaintiffs in error:

In the argument reference was made to the following cases: *Eckman v. Scott*, 34 Neb., 817; *Bowen v. Foss*, 28 Neb., 373; *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 86; *Webb v. Hoselton*, 4 Neb., 308; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 245; *Gregory v. Hartley*, 6 Neb., 356; *Grant v. Cropsey*, 8 Neb., 205.

Thompson & Oldham, contra.

HARRISON, J.

Plaintiffs commenced this action in the district court of Buffalo county to recover the amount alleged in the petition filed to be due them on a promissory note executed and delivered to them by the defendants. E. L. Hopwood, of defendants, answered and admitted the execution and de-

McKinney v. Hopwood.

livery of the note to plaintiffs, and alleged further that she so executed it as surety for her husband, and that personally she did not receive any benefit from signing it, nor was her separate property benefited thereby; that the note was made for the amount of a judgment in favor of plaintiffs against her husband upon an indebtedness incurred by him in the purchase of certain goods and merchandise of plaintiffs, and that the transaction out of which the indebtedness arose and the obtaining of judgment thereon occurred at a time prior to her marriage to her co-defendant. A reply was filed by plaintiff and a trial of the issues had to the court and a jury. At the close of the introduction of the testimony, the trial judge, on motion of counsel for E. L. Hopwood, instructed the jury that "Under the law and the evidence introduced in the action the plaintiff cannot recover against the defendant E. L. Hopwood, and your verdict will therefore be in her favor," etc. The jury followed the direction of the court and returned a verdict in favor of Mrs. Hopwood, in accordance with which judgment was rendered in her favor. The plaintiffs have prosecuted error proceedings to this court.

The main contention of counsel for plaintiffs is that there was evidence in relation to Mrs. Hopwood's signing the note in suit and a consideration for her so doing which should have been submitted to the jury for its deliberation, consequently the action of the trial court in directing a verdict for her was erroneous. It will be remembered that the answer of Mrs. Hopwood, as we have hereinbefore mentioned it, contained an allegation that the consideration for the note, upon which suit was brought, was the release of a judgment against her husband which had been recovered before she became his wife. There was testimony introduced which tended to prove that Mrs. Hopwood, at the time of the execution of the note in suit, held title to certain real estate which had formerly belonged to her husband, and belonged to him at the date the judgment alluded

McKinney v. Hopwood.

to was rendered, and the judgment created at least an apparent lien on the property; that Mrs. Hopwood desired and was negotiating with parties for the purpose of obtaining a loan to be secured by mortgage on the real estate, and that such parties requested that a release of the judgment be secured before completing the loan, and that it was not finally closed until after the release of the judgment, which was procured by the execution and delivery of the note which is the subject of this action. If it became necessary, in order to secure the loan, that the judgment be released, and Mrs. Hopwood attached her signature to a note, the amount of which was made up of the substance of the judgment, and delivered the same to parties owning the judgment, and thereby procured the release and was thus enabled to make the loan, it was a sufficient consideration moving to her to bind her for the payment of the note. The testimony introduced in the effort to establish the connection between the giving of the note and the release of the judgment, and the necessity of the latter in effecting the loan, was somewhat inconclusive and unsatisfactory, but we think was sufficient to have sustained a finding in favor of plaintiffs had the evidence been submitted to the jury, and from its consideration it had so determined. This being true, it was error not to allow the jury to deliberate upon it, and to direct a verdict, as was done by the trial judge. It follows that the judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

CHRISTIAN SPECHT V. R. STEVENS & SON ET AL.,
APPELLEES, IMPEADED WITH FIRST METHODIST
EPISCOPAL CHURCH OF OMAHA, APPELLANT.

FILED JANUARY 22, 1896. No. 5849.

1. **Mechanics' Liens: CONTRACTS.** The contract under which the subcontractor furnished material and performed labor, on account of which he filed the lien sought to be foreclosed in this case, *held* not such a written contract as is contemplated by the provisions of section 3, chapter 54, Compiled Statutes, in regard to mechanics' liens, wherein it states: "When any labor has been done or materials furnished as provided on a written contract, the same, or a copy thereof, shall be filed with the account herein required."
2. ———: ———: **EVIDENCE.** The evidence examined, and *held* to sustain the decree of the district court except as to one item, in which particular it is modified, and, as modified, affirmed.

APPEAL from the district court of Douglas county.
Heard below before IRVINE, J.

Breckenridge, Breckenridge & Crofoot, for appellant.

Schomp & Corson, Blair & Goss, and Tunnickliff & Page,
contra.

HARRISON, J.

This action was instituted by Christian Specht to foreclose a mechanic's lien upon lots 3 and 4, in block 80, in the city of Omaha, and the church building standing thereon, all owned by the First Methodist Episcopal Church of Omaha. R. Stevens & Son, of defendants, were the contractors who built the church. Mickel, Riley & Co., also of defendants, were subcontractors of R. Stevens & Son, the contract of Mickel, Riley & Co. being for the material and labor for the erection of the brick portion of the building, and for a balance alleged to be due the firm on

account of such labor and material, it filed a statement and claim of lien upon the property of the church society and assigned, of the amounts which it was claimed was the firm's due, \$2,281.22 to the First National Bank of Omaha, and any further sum due it on the account and lien, to the Chicago Lumber Company. During the progress of the suit a settlement was made with the plaintiff and the case dismissed, but it was afterwards reinstated in so far as it involved the cross-bill of the First National Bank. After this occurred, and before the trial, the Chicago Lumber Company re-assigned the lien, to the extent it had received an assignment of it, to Mickel, Riley & Co., who were allowed to enter an appearance and file a cross-petition praying for a foreclosure in favor of the firm of this part of the lien. The Kennard Glass & Paint Company did not appear in the cause. The controversy in the case was in respect to the validity of, and the amount due upon the one lien,—that filed by Mickel, Riley & Co. Its enforcement was sought by the party in whose name it was originally filed, and the First National Bank, and was contested by the church organization and R. Stevens & Son, the principal contractors. A trial of the issues resulted in a decree in favor of the First National Bank, establishing the lien and fixing the amount due at the sum of \$2,363.08 and granting its foreclosure. From this decree the church organization has prosecuted this appeal.

When the papers filed by Mickel, Riley & Co. to perfect a lien were offered in evidence, the attorneys who appeared on behalf of the church society objected to them, as immaterial, irrelevant, and incompetent, for the reason that the affidavit shows that it is based upon a written contract, and no copy of the contract was attached to the paper. It is argued that in section 3 of chapter 54 of the Compiled Statutes, in relation to mechanics' liens, it is provided: "When any labor has been done or material furnished as provided on a written contract, the same, or a copy thereof,

shall be filed with the account herein required," and that this is mandatory, and if the labor is performed or materials furnished pursuant to the terms of a contract reduced to writing, and no copy of the contract attached to the papers filed to establish the lien of record, it is not perfected by such filing, and the account and accompanying affidavit were not competent as evidence of a perfected statutory lien. We do not think that the facts in regard to the contract between R. Stevens & Son, the contractors, and Mickel, Riley & Co., subcontractors, being a written one, within the meaning of the portion of the statutes in reference to such contracts, and the necessity of a copy being filed as a part of the mechanic's lien, are such as necessitate a discussion or decision of the question of the mandatory nature of the statutory provision in this particular. It was stated in the affidavit attached to the Mickel-Riley account that the materials were furnished and the labor performed "under a written and verbal contract," but the evidence disclosed that Mickel, Riley & Co. made R. Stevens & Son a proposition in writing, or submitted a written bid to furnish the materials and perform the labor, and that there was subsequently an acceptance of the bid, not in writing, but by word of mouth, and no other or further writing embodying the contract between the parties was ever made or signed, and the agreement, in so far as it was binding upon R. Stevens & Son, was never in any of its terms or conditions reduced to writing. There was clearly no such written contract as is contemplated in the portion of the section of the statutes to which reference has been made.

The further contention of appellant is confined to an attempt to make it appear that of the items of credit which it was claimed by Stevens & Son and the church should be applied to reduce the account filed with the lien in suit, some particular ones were disallowed by the trial court, in respect to which an opposite course should have been adopted. Of these was one in reference to extra brick work

in lieu of stone, one for hauling terra-cotta, and another in relation to staging or scaffolding. It is conceded by counsel for appellant, and is true, that the testimony in regard to each of these items was conflicting; and it is also true that there was ample evidence to sustain the finding of the trial court as to each of them, and it was not clearly contrary to any preponderance of the testimony. This being determined, following a well established rule of this court, the decision of the trial court as to each of these items will not be changed. L. H. Mickel, one member of the firm of Mickel, Riley & Co., subscribed \$500 toward a fund being raised to pay for building the church, and it is claimed that he authorized the trustees of the church society to deduct one-half of this amount from the account of Mickel, Riley & Co. against the contractor, and that the amount so authorized, \$250, should have been allowed as a credit upon the lien, which was not done by the trial court. The evidence discloses that the subscription was made in the amount claimed, and further, that there was something said between L. H. Mickel, the member of the firm who individually subscribed the sum, that its one-half should be applied as a credit on the account of the firm against the contractors, R. Stevens & Son, which might and did ripen into a lien upon the property of the church organization; but such an agreement, if made (which is somewhat doubtful from the evidence), being the agreement of an individual partner acting for himself alone in regard to his personal liability or debt, and not for the partnership, and the agreement not being within the knowledge of the firm or its members, or in any degree concurred in by the firm or the parties comprising it, did not and could not become or be binding upon the firm, or make the amount involved a credit upon the account due such firm.

It appears from the evidence that on July 2, 1889, a note was executed and delivered by R. Stevens & Son to Mickel, Riley & Co. in the sum of \$1,000, that there were

several renewals of this note, and that it was finally paid January or February, 1890. It is claimed on behalf of the appellant that this was a payment upon the account of Mickel, Riley & Co. for material furnished for and labor performed on the church, and it should have been so applied, which was not done in the trial court, it having not been allowed there as an item of credit. At or about the time Mickel, Riley & Co. were working on the church they were also working upon another building or buildings for R. Stevens & Son, and it is asserted for appellees that this \$1,000, evidenced by the note of July 2, 1889, and the renewals thereof, was a payment on an account other than that accruing to the appellee firm on the church contract. A careful examination and consideration of all the testimony relating to this particular item—and we need not discuss it at length—convinces us that the trial court was right in its finding in regard to this point and in not allowing its application as a credit on the account and lien in suit.

There remains but one further point of contention to be noticed. It was shown that Mickel, Riley & Co. executed and delivered to R. Stevens & Son an accommodation note, which the latter firm indorsed and obtained the money thereon at the Omaha National Bank, which was done, R. Stevens testifies, at the solicitation of Mickel, Riley & Co., or one member thereof acting for it, and the money thus obtained was given or paid to the firm, and it was agreed at the time of the transaction that if R. Stevens & Son paid this note, its amount was to be credited as a payment on what was known as "the church account" of appellee firm. At the maturity of this note a similar one was made, and the money obtained by its discount with another and different bank, and with the amount thus procured the first note was paid. The second note was not paid by R. Stevens & Son when it matured and was finally paid by Mickel, Riley & Co., but subsequently R. Stevens & Son reimbursed them

therefor by delivering to them a note, known in the case and the account as the "Hopper note," in the sum of \$300, and paying in cash, or by check, \$125, which overpaid the amount due the firm on account of the payment by it of the \$400 note, but the balance was, Stevens states, to be credited on the account. It is claimed for Mickel, Riley & Co. that the first of these \$400 notes, and, indeed, the whole transaction, was for the accommodation of R. Stevens & Son, and that they, Mickel, Riley & Co., did not receive the money, the proceeds of the first of these notes, and the \$400 should not be deducted from the amount of their account. The finding of the trial court was, as to this contention, favorable to the appellee firm and the First National Bank, successors by assignment to a portion of the firm's rights under the lien, and the \$400 item was not deducted from or credited upon the sum claimed in the lien. After reading and considering all the testimony which has a bearing upon this point of the issues in the case, we are forced to the conclusion that the finding of the trial court thereupon was wrong and against the evidence in relation thereto, and it follows that such determination must be reversed and a finding entered in this court in favor of appellant for the amount involved in the controversy in this branch of the case. The decree of the district court will be modified by the conclusion last announced, which involves a deduction from the amount of the decree rendered herein, of the sum of \$403.63, such deduction to be made as of the date of the original decree, and, as thus modified, such decree is affirmed.

DECREE ACCORDINGLY.

IRVINE, C., took no part in the decision.

THOMAS F. HALL v. DAVID ECCLES.

FILED JANUARY 22, 1896. No. 5953.

1. **Contracts: ABANDONMENT.** An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party.
2. **Sale: EVIDENCE OF ABANDONMENT OF CONTRACT.** The evidence examined, and *held* sufficient to sustain findings and judgment in favor of defendant.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Cowin & McHugh, for plaintiff in error.

H. W. Smith and *C. L. Richards*, *contra*, cited: *Paul v. Meservey*, 58 Me., 419; *Jewell v. Reddington*, 57 Ia., 92; *Harris v. Bradley*, 9 Ind., 166; 2 Addison, Contracts, p. 854.

Bartlett, Crane & Baldrige, also for defendant in error.

HARRISON, J.

Plaintiff in error Thomas F. Hall, with O. N. Ramsey and M. M. Marshall, were, in the year 1886, partners; and the firm thus constituted owned and operated a saw mill, made and sold various kinds of lumber, railroad ties, etc., and also operated several small stores selling general merchandise, and some other industries in and near the village of North Powder, Oregon. Of the partners, Hall owned a one-half interest in the firm and Ramsey and Marshall one-fourth each. At the time stated, and prior thereto, defendant in error was and had been a wholesale and retail dealer in lumber at Ogden, Utah, and owned and operated several saw mills for the supply of his trade. During the month

of October, 1886, plaintiff and defendant in error met, probably at the suggestion or appointment of the latter, in North Powder, and after some negotiations entered into a contract or signed a statement which set forth the sale by Hall to Eccles of the one-half of Hall's interest or a one-fourth interest in the business of the firm, the consideration therefor, as expressed in the instrument, being \$9,062.50 of which no part was paid except possibly \$1. There was a statement in the contract of sale acknowledging the receipt of a payment of \$1. To recover the amount of the consideration expressed in the contract or memorandum of sale referred to was the object of this suit, and from a finding and judgment of the trial court favorable to the defendant the plaintiff has prosecuted error proceedings to this court.

The judgment rendered by the district court was apparently based upon a finding that whatever agreement of sale was entered into between the parties to this action, by the terms of the paper signed by them at North Powder, was afterwards abandoned, and that such abandonment was evidenced by the acts of plaintiff herein inconsistent with or diametrically opposed to the further existence of the agreement, which were acquiesced in by defendant, and that, if it ever possessed any force or validity, it was thus annulled. By the testimony introduced the plaintiff sought to establish that there was an actual, executed, completed sale by him to defendant of a one-fourth interest in the business, as was indicated by the terms of the instrument to which we have alluded, and that nothing remained to be done except payment of the consideration by the defendant, and in furtherance of this purpose it was proved, and not controverted, that immediately after the signatures of the parties were attached to the alleged contract, he accompanied the defendant on a tour of inspection of the various properties and enterprises of the firm and exhibited to him its books and papers, and told him some of the secrets of its

business, or caused the latter to be made known to him. The defendant strove to make it appear that at the time he and plaintiff signed the paper which purported to be a contract of sale and purchase plaintiff was very anxious for him to become a partner, or interested in the firm and its operations, as it needed financial aid, and plaintiff thought defendant would be able to furnish it, and, if interested, would do so, and it was understood that defendant was to make an effort to purchase all, or a portion, of the interest owned by Ramsey and Marshall, or of Ramsey, who, it appears, owned or so controlled Marshall's former interest as to be in a position to make a binding sale of it, and if defendant succeeded in purchasing of Ramsey, the contract between plaintiff and defendant was to be abandoned, but if he did not or could not effect a purchase of Ramsey, then such agreement was to be further pursued. Defendant finally did purchase of Ramsey a one-third interest in the business and properties of the firm. It appears that subsequent to the execution of the instrument which is the foundation of this suit, and before plaintiff was aware that defendant had perfected the purchase of Ramsey, which was consummated in Ogden and could not be known to plaintiff, then at North Powder, plaintiff wrote to defendant that there had arisen a present and pressing need for money to use in the business, and plaintiff had made a draft on Ramsey, as he did not know whether defendant had concluded a deal with Ramsey sufficiently to permit drafts to be drawn upon him (defendant). It is insisted that this letter was inconsistent with the claim of plaintiff that the defendant had purchased of him and was interested in the firm to the extent of a one-fourth interest, and thus had become a member of the firm and in the same position, so far as honoring the draft was concerned, as if any bargain had been closed with Ramsey. It further appears that after the time of the execution of the instrument by plaintiff and defendant which is relied upon in this action, the plaintiff stated, at different times and

places, to various persons that he was the owner of a one-half interest in the business, etc., of the firm; that he wrote to an agent of the Union Pacific Railway Company regarding some money due or to become due the firm from that company, and stated in the letter that he was one-half owner in the business and was then the manager, and strongly urged that the vouchers for claims should be sent to and paid to him (plaintiff). At another time, when \$2,500 was to be divided between the members of the firm, plaintiff received one-half, defendant one-third, and Ramsey one-sixth, and plaintiff executed and delivered to defendant his promissory note for \$833.33 $\frac{1}{3}$, defendant's share of the \$2,500, at a time when he insists defendant was owing him the amount in suit. An agreement was signed by all the members of the firm, including plaintiff, wherein the liability which should attach to defendant as a member of the firm for any indebtedness incurred by it should be limited to the one-third or to the same extent as was his paid-up interest in the properties and business of the firm. Plaintiff testified and produced other witnesses to show that in the last mentioned transaction particularly, and indeed at all times and under all circumstances, he insisted that he still relied upon the contract of purchase and sale now in suit, and its validity, and that nothing he did and no act of his should be taken in any manner or to any degree as weakening the force of his position or rights under such contract; that before he signed the agreement by which the liability of defendant for the debts of the firm was limited to a one-third and no more, he asked for time to see counsel and was granted it, and it was only after feeling fully assured and satisfied that such action would not and could not interfere with the proper enforcement of his contract of sale to defendant, that he consented to sign the other agreement in relation to defendant's liability. There was evidence of other and further facts and circumstances produced by either party to the suit which tended in a greater or lesser

Clafin v. American Nat. Bank of Omaha.

degree to corroborate or support the position assumed under the issues by each, but we do not deem it necessary to further notice them here. After fully and carefully examining all the testimony, we have reached the conclusion that the evidence sustained the finding of an abandonment of the contract of sale, if any was ever in effect, and it follows that the judgment of the district court will be

AFFIRMED.

C. A. CLAFLIN V. AMERICAN NATIONAL BANK OF
OMAHA ET AL.

FILED JANUARY 22, 1896. No. 5884.

1. **Review: OBJECTION TO JUDGMENT.** To obtain a review of a judgment of the district court dismissing an appeal taken from an inferior court no exception is necessary.
2. **Dismissal: REVIEW: MOTION FOR NEW TRIAL.** A ruling of the district court dismissing an appeal may be reviewed without a motion for a new trial.
3. **Appeal: APPEARANCE IN APPELLATE COURT.** When an appeal from a justice of the peace to the district court is taken in the time prescribed by law, and both parties appear in the appellate court and without objection file pleadings, and the cause is noticed for trial, it is then too late for the appellee to object to the validity of the appeal.
4. ———: **PARTIES.** One of several defendants, having separate and distinct defenses, may prosecute an appeal from a justice of the peace to the district court without joining his co-defendants. *Polk v. Covell*, 43 Neb., 884, followed.
5. ———: ———. When the interests of several defendants are inseparably connected, an appeal by one defendant brings up the entire case. (*Polk v. Covell*, *supra*.)

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

Clafin v. American Nat. Bank of Omaha.

A. C. Troup, for plaintiff in error.

Will H. Thompson, *contra*:

A motion for a new trial is necessary to obtain a review of a case on error to the supreme court. (*Harrington v. Latta*, 23 Neb., 98; *Yates v. Kinney*, 25 Neb., 122; *Miller v. Antelope County*, 35 Neb., 237; *Ecklund v. Willis*, 42 Neb., 737.)

NORVAL, J.

This suit was instituted before a justice of the peace by the American National Bank of Omaha, one of the defendants in error, against the Omaha Coffin Manufacturing Company, C. A. Clafin, and S. L. Andrews, to recover the sum of \$150 and interest upon a promissory note, of which the following is a copy:

"\$150. OMAHA, NEB., July 13, 1891.

"Ninety days after date we promise to pay to the American National Bank, or order, one hundred and fifty $\frac{00}{100}$ dollars, for value received, payable at Union National Bank, Omaha, Nebraska, with interest at the rate of ten per cent per annum from maturity until paid. Payable

OMAHA COFFIN MFG. CO.

"C. A. CLAFLIN, *Pres.*

"S. L. ANDREWS, *Sec'y.*"

Personal service of the summons was had upon the defendants, except Andrews, who was not found in the county, and did not appear in the action. Upon the trial a judgment for the face of the note and interest was rendered in favor of the bank, and against both the Omaha Coffin Manufacturing Company and Clafin. Within ten days thereafter, Clafin, for the purpose of prosecuting an appeal from said judgment, filed with the justice an appeal undertaking in the sum of \$320, which was more than double the amount of the judgment and costs, and said

Clafin v. American Nat. Bank of Omaha.

bond and surety thereon were duly approved. Subsequently, and within the time prescribed by statute, a transcript of the proceedings and judgment was filed in the district court, and the appeal was docketed therein. Several months thereafter, and after pleadings had been filed by both parties and issues had been joined, the plaintiff filed a motion to dismiss the appeal, alleging as grounds therefor:

"1. There is a defect of parties on said appeal.

"2. In the court below a joint judgment was rendered against the Omaha Coffin Manufacturing Company and C. A. Clafin, and that said C. A. Clafin only signed the appeal bond herein, and that said C. A. Clafin only is a party to said appeal."

This motion was sustained by the court, and the appeal dismissed. Thereafter, and during the same term, a motion to reinstate the appeal was overruled. Clafin has prosecuted a petition in error to this court, making all the other parties to the action defendants in error, and alleging that there was error in said proceedings: "(1) In sustaining the motion to dismiss the appeal, and (2) in refusing to reinstate said appeal."

It is argued by counsel for the bank that the order dismissing the appeal cannot here be reviewed, since no motion for a new trial was presented to the court below, and no exception was taken to the decision at the time it was made. No exception is necessary to a final judgment, in order to lay the foundation for its reversal. The order of dismissal being a final judgment, an exception was unnecessary. (*Morrow v. Sullender*, 4 Neb., 374; *Black v. Winterstein*, 6 Neb., 224; *Parrat v. Neligh*, 7 Neb., 459; *Jones v. Null*, 9 Neb., 254; *Wellton v. Beltezore*, 17 Neb., 399; *Cheney v. Wagner*, 30 Neb., 262.)

Several decisions of this court are cited to the point that a motion for a new trial is indispensable to a review of a cause in this court on error. It is undoubtedly true that

rulings which properly form the basis, grounds, or causes for a new trial are not available as error in the appellate tribunal unless assigned in a motion for a new trial; and this is as far as the cases cited by counsel for defendants in error go. Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, motions addressed to pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial, to make them available in error proceedings. This is the well settled doctrine of this court. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527; *Hays v. Mercier*, 22 Neb., 656; *O'Donohue v. Hendrix*, 13 Neb., 255; *Graves v. Scoville*, 17 Neb., 593; *Bohanan v. State*, 15 Neb., 209.)

The appellee's motion to dismiss was made too late to raise objection that the appeal was not properly taken. It appears from the record that after the transcript was filed in the court below appellee filed its petition alleging a cause of action against all of the defendants; that Claflin presented a motion to make the petition more definite and certain, which was overruled; that he then demurred to the petition, and on its being overruled, he filed an answer, which plaintiff moved to strike from the files, and that afterwards plaintiff noticed the cause for trial. It was several months subsequent to the docketing of the appeal, and after all the foregoing proceedings were had in the district court, that the motion to dismiss was filed. It was then too late to object to the validity of the appeal, or to defects or irregularities therein. (*Minneapolis Harvester Works v. Hedges*, 11 Neb., 46; *Goodrich v. City of Omaha*, 11 Neb., 204; *Asch v. Wiley*, 16 Neb., 41; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Neb., 189.) Moreover, the appeal was properly taken. There was no defect of parties. The filing of the appeal bond by Claflin alone was sufficient to bring up for review the entire case. The precise point

Haskins v. State.

was passed upon, and that too adversely to the contention of the bank, in the opinion of the present chief justice, after a review of the authorities bearing upon the question, in *Polk v. Covell*, 43 Neb., 884. For the reasons stated, the judgment of the district court must be reversed, the appeal reinstated, and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

FRED W. HASKINS V. STATE OF NEBRASKA.

FILED JANUARY 22, 1896. No. 7949.

1. **Criminal Law: INSTRUCTIONS.** It is error to give an instruction infringing on the province of the jury.
2. ———: ———: **BURDEN OF PROOF.** An instruction in a criminal case is erroneous which has the effect to shift the burden of proof from the state to the accused.

ERROR to the district court for Furnas county. Tried below before WELTY, J.

J. G. Thompson and McClure & Anderson, for plaintiff in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and John F. Fults, for the state.

NORVAL, J.

The plaintiff in error, Fred W. Haskins, was tried in the court below upon an information filed by the county attorney, containing two counts, the first charging him with horse stealing, and the second charging him with grand larceny by stealing a certain buggy, harness, and other personal property of the prosecuting witness. The

accused, on being convicted of both offenses, was sentenced to imprisonment in the penitentiary for the term of two years, and to reverse such judgment and sentence is the purpose of these proceedings.

The crimes charged, if committed at all, occurred at the same time and as a part of the same transaction. The testimony embodied in the bill of exceptions, which was introduced on behalf of the state, tends to show that the plaintiff in error hired, for the period of three weeks, a team of horses, harness, and buggy,—being a portion of the property he was charged with stealing,—from the prosecuting witness for the alleged purpose of going from Oxford, this state, to Gretna to bale some hay; that the property was not returned to the owner within that time, and a search was instituted therefor; that plaintiff in error, instead of taking the outfit to Gretna, went to Lincoln with it, where he attempted to dispose of the same, and did sell the harness to one J. H. Philpot for the sum of \$6. The horses and buggy were found at a livery stable in the capital city. The defendant below introduced evidence tending to prove that the prosecuting witness, at the time of the hiring, authorized the accused to sell or trade the property if he found an opportunity so to do. A further statement of the testimony is unnecessary to an understanding of the questions we shall consider. Forty-nine errors are assigned upon this record, but we shall only notice two, which are predicated upon the fifth and sixth instructions given by the court upon its own motion. These instructions are as follows:

“5. If you find from the evidence that, after the taking of the property by the defendant from the complaining witness, Henry Glahn, that he sold such property, or any part of it, or attempted to sell the same or any part of it, with the intention of appropriating the proceeds thereof to his own individual use and benefit, this is presumptive evidence that the original taking of the goods was

felonious, and unless such sales or attempted sales are satisfactorily explained, you should find the defendant guilty.

"6. The court instructs the jury that, if they find that Henry Glahn, the prosecuting witness, parted with the possession of the property described in the information under the belief on his part that he was loaning such property to the defendant for a certain length of time, it is not necessary that such time should elapse before taking steps to regain possession of the same, and it is immaterial, as far as the crime charged in the information is concerned, what the length of said time was; but if at any time after the taking of said property by the defendant, either before or after the expiration of the time understood by the said Henry Glahn in which said property was to be returned, the defendant sold, or attempted to sell, said property or any part of the same with the intention of appropriating the proceeds thereof to his own individual use and benefit, then the crime charged in the information is sufficiently proven, and unless the defendant satisfactorily explains such sales, or attempted sales, you should find the defendant guilty."

Obviously both of these instructions are bad. The fifth is so conceded by the attorney general, and for that reason he has properly declined to file a brief. By these paragraphs of the charge, the jury are told that if the accused sold, or attempted to sell, the property, or any portion thereof, with the intent to appropriate the proceeds, they should infer therefrom that the original taking was felonious, and should convict, unless the sales, or attempted sales, are satisfactorily explained by the defendant. This is not the law, for two reasons. The effect to be given to the sale or attempted disposition of the property was for the jury alone to determine when considered in connection with all the other evidence adduced on the trial; hence the instructions invaded the province of the jury. Moreover, during the entire progress of the trial, the law surrounds

Goble v. American Nat. Bank of Kansas City.

the defendant with the presumption of innocence, and required the prosecution to establish his guilt beyond a reasonable doubt. Yet these two instructions shifted the burden of proof from the state to the accused by requiring him to overcome the presumption of guilt which the trial court told the jury arose from the sale or attempted disposal of the property. In a criminal trial the burden of proof does not shift, but is on the state at all stages of the trial. The instructions were, therefore, erroneous and prejudicial to the prisoner. (*Burger v. State*, 34 Neb., 397; *Robb v. State*, 35 Neb., 285; *Dobson v. State*, 46 Neb., 250; *Metz v. State*, 46 Neb., 547.) For the errors indicated in these instructions the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FREDERICK E. GOBLE V. AMERICAN NATIONAL BANK
OF KANSAS CITY, MISSOURI.

FILED JANUARY 22, 1896. NO. 5918.

Pleading: ACCORD AND SATISFACTION. To a petition upon a cause of action not controverted, where there is attempted to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged.

ERROR from the district court of Webster county. Tried below before BEALL, J.

James McNeny, for plaintiff in error.

References: *Evans v. Powis*, 1 Exch. [Eng.], 601*; *Good v. Cheesman*, 2 B. & Ad. [Eng.], 328; *Sard v. Rhodes*, 1 M. & W. [Eng.], 153; *Billings v. Vanderbeck*, 23 Barb.

Goble v. American Nat. Bank of Kansas City.

[N. Y.], 546; *Goodrich v. Stanley*, 24 Conn., 613; *Bigelow v. Baldwin*, 1 Gray [Mass.], 245; *Hall v. Smith*, 15 Ia., 584; *Merry v. Allen*, 39 Ia., 235; *Babcock v. Hawkins*, 23 Vt., 561.

George R. Chaney, contra.

RYAN, C.

The American National Bank of Kansas City, Missouri, as indorsee, brought an action in the district court of Webster county, upon a promissory note executed by the defendant, of date May 8, 1891, payable thirty days after date to the First National Bank of Red Cloud. The answer of the defendant was to the effect that while plaintiff was the owner of the note sued upon, the defendant agreed with plaintiff to turn over to plaintiff a sufficient number of cattle owned by defendant at a price to be fixed by one Samuel Temple, to pay off and discharge the said note, and, in consideration of the promise and agreement aforesaid made by defendant to plaintiff, the plaintiff on its part agreed to turn over, deliver, cancel, discharge, and surrender to this defendant the note sued upon, and in consideration of the mutual agreement then entered into by defendant and plaintiff, the said plaintiff agreed to cancel and deliver up to defendant the note sued on; and the defendant alleged that he, at all times from the making of said agreement, had been ready and willing to perform and fulfill said agreement in all things on his part to be performed, and to take and accept the said note sued on, and to turn over to plaintiff the cattle so agreed to be turned over. A demurrer was sustained to this defense, and judgment was thereupon rendered against the defendant, who prosecutes error proceedings to this court.

We have not been favored with a brief by the defendant in error, but in the brief of the plaintiff in error we find quoted from 2 Parsons, Contracts [6th ed.], p. 836, this

language: "If he [the defendant] sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction, and does not aver performance, the pleading will, of course, be bad." Referring to the averments in the answer we find that, as alleged, "the defendant agreed to and with plaintiff to convey and turn over to plaintiff a sufficient number of cattle which the defendant then owned * * * to pay off and discharge the said note," etc. From this statement no other conclusion can be reached than that there was a promise to accept payment of the note in cattle. From the other averments of the answer it is also clear that neither the cattle were selected nor yet was there a price fixed. There was, therefore, no averment of performance, and the pleading, within the above rule, was properly held bad. The judgment of the district court is

AFFIRMED.

NEBRASKA EXPOSITION ASSOCIATION V. RICHARD H.
TOWNLEY.

FILED JANUARY 22, 1896. No. 5965.

1. **Subscriptions: PAROL EVIDENCE.** In an action upon a written subscription parol evidence is not admissible to add conditions to those expressed in the writing sued upon.
2. **Corporations: SUBSCRIPTIONS: COUNTER-CLAIMS: PLEADING.** Where a defendant, by way of counter-claim, alleges that he was induced to make a subscription for the benefit of a corporation upon the faith of a promise contemporaneously made by an agent of such corporation that an amount of capital stock of such corporation equal to such subscription would be issued to him, such subscriber should aver the payment, or, at least, a legal tender, of the amount of such subscription before he is entitled to claim anything by reason of a failure to issue the stock.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

A. G. Greenlee, for plaintiff in error, cited: *Aultman v. Brown*, 40 N. W. Rep. [Minn.], 159; *McClure v. People's Freight R. Co.*, 90 Pa. St., 271; *Roche v. Roanoke Classical Seminary*, 56 Ind., 188; *Gibbs v. Holcomb*, 1 Wis., 33; *Howe Machine Co. v. Clark*, 15 Kan., 492; *Streeter v. Poor*, 4 Kan., 412.

Roscoe Pound and Burr & Burr, contra, cited: *Luce v. Foster*, 42 Neb., 818; *Walker v. Haggerty*, 30 Neb., 120; *De Camp v. Scofield*, 75 Mich., 449; *Dicken v. Morgan*, 54 Ia., 684; *Gulf, C., & S. F. R. Co. v. Jones*, 82 Tex., 156; *Louisville, St. L. & T. R. Co. v. Neafus*, 93 Ky., 53; *Board of Trustees of Seventh Day Baptist Memorial Fund v. Saunders*, 84 Wis., 570; *Lake Manawa R. Co. v. Squire*, 57 N. W. Rep. [Ia.], 307; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186; *Esterly Harvesting Machine Co. v. Froley*, 34 Neb., 110.

RYAN, C.

Plaintiff in error sued the defendant in error for the recovery of the sum of \$50. The averments of the petition as to plaintiff's cause of action were as follows: "During the month of January, 1890, the defendant entered into a written contract with the plaintiff whereby he agreed to pay for the purpose of assisting the plaintiff to erect certain accommodations for the Nebraska Agricultural Society, on the grounds of the plaintiff, the sum of fifty dollars (\$50), on condition that the state fair should be located upon the said grounds at the said city of Lincoln for the five years beginning 1890, and that the said sum was to be paid upon the location of the state fair at said place." Full performance of the condition upon which this subscription was to be paid, as well as defendant's refusal upon demand to pay

the amount subscribed by him, were further alleged by the plaintiff. In his answer the defendant admitted "that he signed a written subscription whereby he agreed to pay the sum of \$50 to plaintiff as alleged; that the said sum has not been paid, and admits that the state fair was located upon the grounds of said corporation [the plaintiff] in the city of Lincoln as alleged."

Before noticing the affirmative matter pleaded in the answer it is proper to say that the defendant in error cannot now insist that the terms of the contract of subscription, by reason of not being set out in the record, cannot be known to this court, for, having admitted that defendant was to pay as alleged in the petition, we must assume that the terms had been therein fully as well as accurately stated. So, too, of the performance. It was admitted in the answer that the state fair had been located as alleged, and this is the only condition precedent to be found in the contract as it was described in the petition. There were, therefore, admissions in the answer which described the conditions upon which the defendant in error was to become liable, which disclosed the full performance of those conditions necessary to fix the liability of the defendant, and the failure of the defendant to make payment in accordance with his said agreement. By way of the affirmative defense it was averred, however, that "the plaintiff, through one John Sheedy, who was then and there its duly authorized agent, promised and agreed to and with the defendant to issue and execute to the defendant \$50 of stock of the said corporation [plaintiff], and that defendant, in consideration thereof, signed said subscription, and that said promise to issue and deliver said stock to the defendant was the sole and only consideration of said subscription; and the defendant further alleges that, although often requested, the defendant has failed and refused to execute or deliver said stock to the defendant, and that the consideration of said subscription has wholly failed." In another paragraph

of his answer the defendant pleaded the same facts as above pleaded with reference to the agreement to issue stock to him, and, having alleged the value of such stock and the refusal upon demand to issue it, he asked that the value of such stock be allowed in his favor by way of counterclaim. The dual manner in which these affirmative matters have been stated does not involve a separate consideration of the rules of pleading or evidence governing each, for these rules in one case are the same as in the other. If by the language quoted from the answer it was intended to allege that upon payment of the subscription the stock would be issued to defendant, such tender of payment was a necessary condition precedent to the defendant's right to have stock issued to him, and the non-issue of such stock therefore constituted no matter of defense. This defense was wanting in necessary averment and was bad. If, however, upon this affirmative language it is claimed that the issue of stock was a necessary condition precedent to entitle plaintiff to payment of the defendant's subscription, it is a complete answer to this claim to call attention to the fact that in the written contract, admitted to be correctly reflected in the petition, no such condition existed. The engrafting of another condition by the proffered testimony would be in violation of the rule that all previous and contemporaneous negotiations and conversations leading to the contract are merged in it and cannot therefore be established by oral testimony. (*Mills v. Miller*, 4 Neb., 441; *Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216.) This defense was, therefore, unavailing, and should have been so held upon the evidence tendered in support of it. The judgment of the district court is

REVERSED.

A. H. GOULD V. D. B. ARMAGOST ET AL.

FILED JANUARY 22, 1896. No. 5916.

1. **Chattel Mortgages: TITLE TO CHATTELS.** The legal title to property pledged by a chattel mortgage remains in the mortgagor and creates merely a lien. *Musser v. King*, 40 Neb., 892, and *Camp v. Pollock*, 45 Neb., 771, followed.
2. **Execution: SALE OF MORTGAGED CHATTELS.** The title and interest of a mortgagor of chattels therein may be levied upon and sold under execution against him, the mortgagor being in possession.
3. ———: ———: **TITLE OF PURCHASER.** A purchaser at such sale is thereby subrogated to all the rights, but only the rights, such mortgagor had to such property at the time of the levy of the execution thereon.
4. ———: ———: ———. A purchaser at such sale takes the property subject to all valid liens and the rights of the holders thereof existing thereon at the time of the levy of the execution under which the sale was made.
5. **Chattel Mortgages: EXECUTION SALES: TENDER OF PAYMENT OF DEBT BY PURCHASER.** An unconditional tender by such a purchaser of the entire debt secured by a chattel mortgage existing against said property, the debt being at the time of the tender due and the tender being kept good, divests the lien of the mortgage and entitles the purchaser to the possession of the property. *Tompkins v. Batie*, 11 Neb., 147, and *Knox v. Williams*, 24 Neb., 630, followed.
6. ———: ———: ———: **COSTS.** Such a tender, to be good and divest the lien of the mortgage, in addition to the amount of the mortgage debt, must include all reasonable and necessary expenses which have been incurred by the holder of the mortgage in taking possession of the mortgaged property and in enforcing his lien thereon.

ERROR from the district court of Butler county. Tried below before WHEELER, J.

A. J. Evans and S. H. Steele, for plaintiff in error.

Matt Miller, contra.

RAGAN, C.

One Zwicker owned a kiln of brick which he pledged by a chattel mortgage to one Zellar to secure a debt of \$100 and interest. After the note evidencing the mortgage had matured, Zellar sold and indorsed it to one Carpenter. On the 14th of December, 1889, in a justice court of Butler county, one Scott recovered a judgment against said Zwicker. May 3, 1890, an execution was issued on this judgment and delivered to a constable for execution, who levied the same on the kiln of brick belonging to Zwicker; and on the 17th of May, 1890, the constable sold the kiln of brick to one Gould. The levy and sale were made subject to the lien of the Zellar mortgage. Carpenter, on the day of or the day before the execution sale, took possession of the kiln of brick, was present at the sale, and objected thereto, advising the constable that he, Carpenter, owned the Zellar mortgage. After Gould had purchased the kiln of brick at the constable's sale, he tendered to Carpenter, the owner and holder of the Zellar mortgage and the debt which it secured, the full amount of said debt, principal and interest, and demanded possession of the kiln of brick, and kept this tender good by depositing the amount thereof with the clerk of the district court, which being refused, he brought this suit in replevin in the district court of Butler county. The jury returned a verdict in favor of Carpenter, upon which judgment was rendered, and Gould prosecutes to this court a petition in error.

The judgment is contrary to law, the instructions of the district court, and wholly unsupported by the evidence. The fact that Zwicker had mortgaged the brick to Zellar did not invest the latter with the legal title to the brick, and of course Zellar's assignee, Carpenter, did not become possessed of the legal title by taking an assignment of the mortgage debt. Notwithstanding this mortgage the legal title to the brick remained in Zwicker until divested by

foreclosure, either in a proceeding in equity or a proceeding under the statute, and the mortgagee acquired by the mortgage only a lien upon the mortgaged property. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Camp v. Pollock*, 45 Neb., 771; *Sharp v. Johnson*, 44 Neb., 165.) The constable in levying upon these brick levied only upon the interest of Zwicker, the execution debtor therein. In this case he did not attempt to levy upon anything else than Zwicker's interest, and it would have made no difference if he had. The constable, in selling these brick under the execution, sold only the interest therein of Zwicker. In this case the constable did not pretend or attempt to do more, and the attempt would have been unavailing if he had. Gould, by purchasing these brick at the constable's sale, purchased only the interest which Zwicker, the execution debtor, had in them, and took the brick subject to the liens existing against them at the time of the levy. In other words, the effect of the levy and sale was to transfer to Gould, the purchaser, the same title to the property sold that the execution debtor had when the levy was made, but when Gould purchased these brick Carpenter was entitled to possession and in possession of the brick by virtue of his chattel mortgage, and at that time Gould was not entitled to possession of the brick as against Carpenter. Though Carpenter's mortgage was a lien upon this property, the debt which it secured was past due, and Gould tendered him the full amount of money due on the mortgage debt and demanded possession of the mortgaged property. Gould having unconditionally tendered the full amount of the debt secured by the mortgage, the latter ceased from that moment to be a lien upon the property, and Gould, as owner of the legal title, became then entitled to the possession of the property (*Tompkins v. Batie*, 11 Neb., 147; *Knox v. Williams*, 24 Neb., 630); and having kept said tender good by depositing it in court when he instituted this action, he was entitled at that time also to the possession of the property.

Beatrice Paper Co. v. Beloit Iron Works.

On the trial to the jury Carpenter sought to parry the force and effect of the tender of the mortgage debt made to him by Gould by claiming that Gould in this tender did not include the expense which he, Carpenter, incurred in taking possession of the mortgaged property. There are two answers to this contention: First, at the time the tender was made by Gould, Carpenter did not set up or claim or pretend that he had incurred any expense in and about taking possession of the mortgaged property nor refuse the tender on that ground; second, the evidence, without conflict, shows that Carpenter's claim that he had incurred any expense in the taking possession of this property has no foundation in fact.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

Post, C. J., not sitting.

BEATRICE PAPER COMPANY V. BELOIT IRON WORKS.

FILED JANUARY 22, 1896. No. 5946.

1. **Error and Appeal: ELECTION OF REMEDIES.** If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election; and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa*; but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error. *Woodard v. Baird*, 43 Neb., 310, and *Monroe v. Reid*, 46 Neb., 316, followed and reaffirmed.
2. **Judicial Sales: ORDER OF CONFIRMATION: REVIEW.** In a proceeding in error from a decree of the district court confirming a judicial sale this court will not review a question involving the

Beatrice Paper Co. v. Beloit Iron Works.

merits of the original decree. *State Nat. Bank of Lincoln v. Scofield*, 9 Neb., 499; *Stratton v. Reisdorph*, 35 Neb., 314; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, followed and reaffirmed.

3. **Orders Recalling Executions: POWER OF COURTS.** The district courts of this state have authority to control their process, and for sufficient reason may recall an execution or order of sale and set aside an appraisalment of property made thereunder.
4. **Order of Sale: DESCRIPTION OF PROPERTY: RECALLING EXECUTION.** The fact that all the property made liable by a decree is not described in the execution or order of sale issued is sufficient reason to authorize the district court to recall the order of sale and set aside the appraisalment made thereunder.
5. **Decrees: PROCEDURE: NOTICE.** In a suit in equity, where the decree has been entered and the case is still on the docket pending proceedings to sell the property, all of the parties to the case, in the absence of a rule on the subject, are bound to take notice of all the orders entered and steps taken by the court in the case in term time which do not affect the original decree.
6. **Judicial Sales: CONFIRMATION AT CHAMBERS: CONSTITUTIONAL LAW.** The constitutionality of the act passed and approved February 25, 1875 (Session Laws, 1875, p. 38), by which section 498 of the Code of Civil Procedure was so amended as to confer authority upon the district judges sitting in chambers to confirm judicial sales, is no longer an open question in this court. *McMurtry v. Tuttle*, 13 Neb., 232, reaffirmed.
7. **Statutes: REPEAL: CONSTRUCTION.** The act passed and approved March 2, 1881 (Session Laws, 1881, p. 226, ch. 46) does not repeal any part of section 498 of the Code of Civil Procedure, nor repeal section 39 of the act passed and approved February 27, 1879 (Session Laws, 1879, p. 90), but said laws should all be construed together.
8. ———: ———: ———. A statute will not be construed as repealing by implication another statute unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137.)

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

*J. E. Cobbe*y and *G. M. Johnston*, for plaintiff in error.

S. L. Geisthardt and S. D. Killen, contra.

RAGAN, C.

This is a suit in equity in the district court of Gage county brought by the Beloit Iron Works against the Beatrice Paper Company and others. In its petition the Iron Works claimed that the Paper Company was indebted to it in a large sum of money for labor and material furnished by it to the Paper Company towards the erection of a paper mill on its property, and claimed a lien upon the property of the Paper Company under the mechanics' lien law of the state to secure the payment of the Paper Company's indebtedness to it. The Iron Works had a decree as prayed in its petition, under which the property of the Paper Company was sold to the Iron Works, the sale confirmed, and the Paper Company prosecutes to this court proceedings in error.

1. The Paper Company has filed in this court what it denominates a "petition in error and on appeal," and thus seeks to have this court review the judgment of the district court both on appeal and error. In *Woodard v. Baird*, 43 Neb., 310, it was held that "when a case is in its nature appealable, and the party seeking a review files, in connection with the transcript, a petition in error, he will be deemed to have elected to proceed in error, and not by appeal;" and in *Monroe v. Reid*, 46 Neb., 316, it was held that "a case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and having filed a petition in error, must be presumed to have selected that remedy." It must, therefore, be considered as settled that a litigant cannot have reviewed in this court a judgment of a district court both on appeal and in error. If the judgment which the litigant seeks to have reviewed is appealable he may have it reviewed on appeal or error, at his election; and

he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or he may dismiss his petition in error and stand on his appeal; but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error.

2. The first assignment of error argued here by counsel for the Paper Company is that the main decree rendered by the district court in the action is erroneous, in that it makes the debt found due to the Iron Works from the Paper Company a lien under the statute upon certain property owned by the Paper Company, and on which property the material and labor furnished by the Iron Works were not used in constructing the improvements for the Paper Company; and that, therefore, the court erred in issuing an order for the sale of the property of the Paper Company made liable by the decree for the debt. But the petition in error filed here by the Paper Company does not assail in any respect the correctness of the decree of the district court. The petition in error challenges only the correctness of the proceedings of the district court subsequent to the rendition of such decree and prays that the order confirming the sale made under the decree may be reversed. In *State Nat. Bank of Lincoln v. Scofield*, 9 Neb., 499, it was held: "On an appeal from an order of the district court confirming a sale of mortgaged premises, held that this court would not consider a question involving the merits of the original case." In *Stratton v. Reisdorph*, 35 Neb., 314, it was held: "Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterwards to defeat confirmation assail the decree for mere irregularity." (See, also, *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.) The court had jurisdiction of the subject-matter of the action and of the parties

thereto, the petition stated a cause of action, the decree rendered is supported by the pleadings, and no appeal has ever been taken from this decree, nor has any proceeding in error been had or commenced which challenges its correctness. We cannot, therefore, look into the record for the purpose of ascertaining whether the decree is erroneous. It is not void. It is not directly attacked in this proceeding, and it must therefore be conclusively presumed to be valid.

3. An order for the sale of a part of the property described in the main decree was issued, such property appraised, advertised, and offered for sale and not sold for want of bidders. The sheriff returned such order of sale into court, reciting his proceedings under it, and thereupon counsel for the Iron Works moved the court to vacate and set aside the appraisement made of the property and for the issuance of an *alias* order of sale upon the ground that all of the property described in the main decree was not mentioned in the order of sale issued. This motion the court sustained, vacating the first appraisement and ordering an *alias* order of sale to issue. The action of the court in thus vacating the first appraisement is the second error assigned and argued. It is first insisted that the court was without authority to vacate the first appraisement until the property had been twice offered for sale under the appraisement and not sold for want of bidders; and that the language of this court in *Hubbard v. Draper*, 14 Neb., 500, holding that an appraisement of real estate might be vacated by the court for any sufficient reason, is a mere "*dictum*." Whether the language used by the court in the case cited is a "*dictum*" or not, we do not think it necessary to cite authority to the proposition that a court has authority to control its process, and for sufficient reason to recall an execution or an order of sale and to set aside an appraisement made of property under execution and this statement is not to be considered *obiter*. On looking into the record we find that some of the prop-

erty described in the decree was not described in the first order of sale. This, of itself, was sufficient to authorize the district court to recall the order of sale and set aside everything that had been done under it. The Iron Works had the right to insist that the order of sale should be as broad as the decree, and that the sale of the property should be made in accordance with the decree of the court. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)

A second argument made to sustain this assignment of error is that the court made the order vacating the first appraisal without any notice to the Paper Company or its counsel. We assume for the purposes of this opinion that the Paper Company had no actual notice of the application of the Iron Works to the court to vacate the appraisal and did not know that the same had been vacated until long afterwards. But this application to vacate the appraisal was made in open court. The order vacating the appraisal was made on one of the days of a regular term of the court and while it was in session transacting business. The case was on the docket. Proceedings were pending for the sale of the property under the decree in the action. The officer had made his return of what he had done under the order of sale. It was on file, and the Paper Company and all other parties to the suit, in the absence of some rule of the court on the subject, were bound to take notice of every step taken in the case by the court which did not affect the original decree.

4. The order confirming the sale was made by the judge of the district court at chambers upon due notice to all parties. The final assignment of error is that the district judge had no jurisdiction to make this order. The argument advanced to sustain this contention is as follows: Section 498 of the Code of Civil Procedure in express terms confers authority upon the district judges to confirm sales of real estate in vacation. The legislature on the 27th day of February, 1879 (see Session Laws, 1879, p. 82),

passed an act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts.'" By section 39 of this act it was provided that a judge of the district court might sit in chambers anywhere within his district for the purpose of confirming judicial sales and for other enumerated purposes; and on the 2d day of March, 1881, the legislature passed another act entitled "An act to give to the several judges of the judicial districts of Nebraska certain powers when sitting in chambers anywhere within their respective judicial districts." (See Session Laws, 1881, p. 226, ch. 46.) By this act certain powers were conferred upon the district judges when sitting in chambers, but the power to confirm judicial sales was not one of the powers mentioned in the latter act. Counsel for the Paper Company correctly say that so much of said section 498 of the Code of Civil Procedure as authorizes a judge of a district court to confirm a judicial sale at chambers owes its origin to the act of the legislature passed and approved February 25, 1875 (see Session Laws, 1875, p. 38); and the argument is that this last act, by which said section 498 of the Code of Civil Procedure was amended, is unconstitutional and void. The constitutionality of this act of 1875 amending said section 498 of the Code of Civil Procedure was considered by this court in *McMurtry v. Tuttle*, 13 Neb., 232, and it was there held that the act was not repugnant to the constitution. The validity, then, of said section 498 of the Code of Civil Procedure, as it now stands, is no longer an open question. It is also argued that section 39 of the act of 1879, quoted above, is also unconstitutional, but since section 498 of the Code of Civil Procedure is valid and confers authority upon judges of the district court sitting in chambers to confirm judicial sales, we need not stop to inquire whether the act of 1879 be valid or not. Again, it is insisted that the act of 1881, quoted above, is a valid act in all respects, and that by that act the act of 1879 and so much of section 498 of the

Chicago, R. I. & P. R. Co. v. Archer.

Code of Civil Procedure as authorizes a judge at chambers to confirm a judicial sale were repealed. If the act of 1881 repeals section 498 of the Code of Civil Procedure and section 39 of the act of 1879, quoted above, it must be by implication, as the act does not assume, either in its title or body, to repeal any previous law, and there is no repugnancy between the act of 1881 and section 498 of the Code of Civil Procedure and the act of 1879 quoted above. All these statutes, then, should be construed together. A statute will not be construed as repealing by implication another statute unless the repugnancy between the two statutes is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137, and case there cited.) The assignments of error, then, and each of them, are therefore overruled and the judgment of the district court is in all things

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. GIDEON ARCHER.

FILED JANUARY 22, 1896. No. 5752.

1. **Expert Witnesses: HYPOTHETICAL QUESTIONS: OBJECTIONS.**

An objection to a hypothetical question put to an expert witness, that it is "incompetent, immaterial, and irrelevant," is too general to raise the point that the question involves erroneous statements of evidence.

2. ———: ———. A hypothetical question, after stating a number of hypotheses, concluded, "[suppose] he has been unable to work by reason of such injury for a period of seven months, * * * to what would you attribute his inability to work, and for what period would he be partially or wholly incapacitated for labor, and until what time would it require for a total disappearance of the pains and other results of such injuries and leave no trace thereof?" *Held*, That the first two inquiries relating to facts expressly assumed were not prejudicial, and that

Chicago, R. I. & P. R. Co. v. Archer.

the last was an inquiry as to the probable future duration of the injury, and a proper question to ask an expert.

3. ———: ———: **RULINGS ON OBJECTIONS.** The court, in overruling an objection to a hypothetical question, remarked: "I think that is a fair epitome of the evidence already given in the case." *Held*, Not error.
4. **Damages: PERSONAL INJURIES: INSTRUCTIONS.** In an action for personal injuries it is error to submit to the jury a consideration of the question, in assessing damages, as to whether the injuries were permanent, in the absence of evidence tending to establish such permanency of injuries with reasonable certainty.
5. ———: ———: ———: **HARMLESS ERROR.** Even where the damages are unliquidated, where the trial court has, by an instruction, submitted to the consideration of the jury an element of damages not sustained by the evidence, the error will be treated as harmless where, from an examination of the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the element improperly submitted.

ERROR from the district court of Sarpy county. Tried below before HOPEWELL, J.

The facts are stated by the commissioner.

W. F. Evans and *C. S. Montgomery*, for plaintiff in error:

The objection to the hypothetical questions assuming that plaintiff had been unable to work by reason of his injury should have been sustained. The questions assumed a conclusion or ultimate fact, which was for the jury alone to determine. (*Haish v. Payson*, 107 Ill., 370; *Bishop v. Spinning*, 38 Ind., 144; *Muldrowney v. Illinois C. R. Co.*, 39 Ia., 616.)

The hypothetical questions assume that the wagon in falling upon the plaintiff struck him "in the small of the back" at the "base of the spinal column." This assumption is without support in the evidence. Hypothetical questions must present facts which the evidence tends to prove. If the facts embraced in them are not proved or

attempted to be proved, objections to such questions should be sustained. (1 Thompson, Trials, sec. 606; *State v. Anderson*, 10 Ore., 448; *Williams v. Brown*, 28 O. St., 547; *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Ia., 76; *Bomgardner v. Andrews*, 55 Ia., 638; *Haish v. Payson*, 107 Ill., 365; *Guetig v. State*, 66 Ind., 95; *Hathaway v. Nat. Life Ins. Co.*, 48 Vt., 336.)

Hypothetical questions must not embrace matters within the range of ordinary human experience, because as to such matters the opinions of the jurors are better in the eye of the law than those of the experts. (1 Wharton, Evidence, secs. 434, 436; 1 Thompson, Trials, sec. 605; *New England Glass Co. v. Lovell*, 7 Cush. [Mass.], 319; *State v. Anderson*, 10 Ore., 448; *Hill v. Portland & R. R. Co.*, 55 Me., 439; *State v. Watson*, 65 Me., 74; *Linn v. Sigsbee*, 67 Ill., 76.)

The instruction relating to the elements of damage was erroneous. (2 Shearman & Redfield, Negligence, sec. 743; *Curtis v. Rochester & S. R. Co.*, 20 Barb. [N. Y.], 292; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 306; *Tozer v. New York, C. & H. R. R. Co.*, 105 N. Y., 617; *Feeny v. Long I. R. Co.*, 116 N. Y., 381; *Clark v. Nevada Land & Mining Co.*, 6 Nev., 205; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis., 580; *Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cases [Ind.], 339; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind., 264; *White v. Milwaukee C. R. Co.*, 21 N. W. Rep. [Wis.], 524; *Missouri P. R. Co. v. Mitchell*, 41 Am. & Eng. R. Cases [Tex.], 226; *Fry v. Dubuque & S. W. R. Co.*, 45 Ia., 416; *Walrath v. State*, 8 Neb., 80; *Union P. R. Co. Ogilvy*, 18 Neb., 643; *Chicago, B. & Q. R. Co. v. Sykes*, 96 Ill., 163; *McGowan v. St. Louis Ore & Steel Co.*, 16 S. W. Rep. [Mo.], 236.)

Matthew Gering, contra:

The objections to the hypothetical questions were insufficient to raise the questions argued by plaintiff in error.

Chicago, R. I. & P. R. Co. v. Archer.

(*Powers v. Mitchell*, 77 Me., 361; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind., 409; *McCooey v. Forty-Second Street & Grand Street Ferry R. Co.*, 29 N. Y. Sup., 369.)

The objections to the hypothetical questions were properly overruled. (*Gottlieb v. Hartman*, 3 Colo., 53; *Williams v. State*, 64 Md., 384; *Kerr v. Lunsford*, 31 W. Va., 660; *Cowley v. People*, 83 N. Y., 464; *Dilleber v. Home Life Ins. Co.*, 87 N. Y., 79; *Turnbull v. Richardson*, 69 Mich., 400; *Quinn v. Higgins*, 63 Wis., 664; *Filer v. New York C. R. Co.*, 49 N. Y., 46; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 44; *Stearns v. Field*, 90 N. Y., 641; *Lincoln Vit-rified Paving & Pressed Brick Co. v. Buckner*, 39 Neb., 86; *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn., 511; *McDonald v. Illinois C. R. Co.*, 55 N. W. Rep. [Ia.], 102; *Van Hoesen v. Cameron*, 54 Mich., 609; *Eiseley v. Malchow*, 9 Neb., 174.)

In support of an argument in favor of the instruction complained of, reference was made to the following cases: *Illinois C. R. Co. v. Read*, 37 Ill., 484; *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Baker v. Kansas City, C. & S. R. Co.*, 52 Mo. App., 602; *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb., 164; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis., 583; *Kerr v. Forgue*, 54 Ill., 482.

IRVINE, C.

Archer recovered a judgment of \$1,500 against the railway company in the district court of Sarpy county for personal injuries alleged to have been sustained by Archer in consequence of falling into a cut made by the railway company along the public highway, and left without guards to protect passengers on the highway from falling therein. Three assignments of error relate to the overruling of objections to a hypothetical question asked on behalf of Archer on the examination of as many expert witnesses. The question asked each witness was as follows: "Suppose a young man, aged about twenty-six years, in good, sound

physical health, is thrown or falls down an embankment a distance of between sixteen and eighteen feet while driving along the public highway in a lumber wagon, the young man falling on his face, the wagon falling on him, striking him in the small of the back at the base of the spinal column, one of the horses which he was driving was killed and another injured; that by reason of such fall, which resulted in the breaking of the bone of the leg and dislocating the ankle joint,—supposing this to have occurred in November, 1890,—necessitating the young man's confinement to a bed for a period of about eight weeks, and during which period he was incapable of moving in his bed because of severe pains in his back and injury to his leg; and that he constantly complained of severe pains and injuries to his spine and back, and thereafter, for a period of nearly three months, was unable to walk without the aid of crutches; that from the time of the injury up to the present time he had constantly complained of pains in his back, and has been unable to work by reason of such injury for a period of seven months, except at light labor for about forty days,—these conditions all existing, to what would you attribute his inability to work, and for what period would he be partially or wholly incapacitated for labor, and until what time would it require for a total disappearance of the pains and other results of such injuries, and leave no trace thereof?"

It is argued that these objections should have been sustained, because, in the first place, the injection of the phrase "by reason of such injury" introduced into the question not a hypothesis of fact, but an inference for the jury to draw, and one improper to submit to an expert as a basis for a further opinion; and second, that in certain respects there was no evidence tending to establish hypotheses of fact involved in the question. When the question was propounded to one of the witnesses the objection was made that it was "incompetent, irrelevant, and immaterial."

Chicago, R. I. & P. R. Co. v. Archer.

When put to the other witnesses the objection was: "Objected to by defendant, as incompetent and immaterial, and for the reason that no foundation has been laid for the question, and the question is not single, but multiform in character and not properly framed." The defendant in error contends that these objections are insufficient to present for review the questions now argued; and after careful consideration we are convinced that his contention is correct. In this state the strict rule prevailing in many jurisdictions requiring that all objections shall be specific has not prevailed. An objection that a question is "incompetent, irrelevant, and immaterial" has been here held sufficient generally to apprise the court of any ground of complaint falling within the meaning of those terms (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104); but, on the other hand, this court has held that where a deed is offered in evidence, such an objection is too general to reach defects in the form, execution, or acknowledgment of such deed (*Gregory v. Langdon*, 11 Neb., 166), or the fact that the deed has no witness (*Rupert v. Penner*, 35 Neb., 587). In such cases the objection must be specific, and call the attention of the trial court to the precise defect complained of. The same reasons which controlled the court in the two cases last cited are peculiarly applicable to a hypothetical question asked an expert witness. The general objection directs attention only to the general scope and character of the question. There is much reason in the language of Mr. Justice Daniel (*Camden v. Doremus*, 3 How. [U. S.], 515): "Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects, which the objector himself either would not or could not point to their view. It would

be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured." The precise question has been passed upon by the circuit court of appeals for this circuit, Judge Thayer saying: "We would not be understood as deciding that an objection on the ground of 'incompetency, irrelevancy, and immateriality' is always too general, but we think that, when counsel intend to rely on the ground that a hypothetical question propounded to an expert witness is based upon an erroneous statement of the evidence, that fact, at least, should be called to the attention of the trial court." (*Missouri P. R. Co. v. Hall*, 66 Fed. Rep., 868. See, also, *Powers v. Mitchell*, 77 Me., 361; *Currier v. Henderson*, 85 Hun [N. Y.], 300.) The objections here argued relate to only a small portion of the question propounded. If the objection had specifically called attention to this portion at the time of the trial, and the objection were well taken, the question might have been readily re-framed in order to meet it. We do not think that the objections that no foundation had been laid for the question, and that the question was not properly framed, are sufficient to suggest the defects complained of, and the objection that the question was not single certainly does not go to the point.

A further objection is made that the question relates to a matter within the range of ordinary human experience, and not to one within the range of expert testimony. This objection probably goes to the competency of the whole question, but we do not think it is well taken. The question asks three things: First, to what would you attribute his inability to work? Second, for what period would he be partially or wholly incapacitated for labor? And third, what time would it require for a total disappearance of the

pains and other results of such injuries? The first two elements are merely a repetition of assumptions already made in the question, and for that reason are certainly not prejudicial. The third was an inquiry as to the ultimate period of suffering from injuries which had so far produced the effect stated in the body of the question. This was certainly a subject peculiarly within the domain of expert testimony.

The court, in overruling the objection to the question when first propounded, remarked: "I think that is a fair epitome of the evidence already given in the case." An exception was taken to this remark. Counsel construe this remark as indicating to the jury that the trial judge deemed the facts assumed in the question established by the evidence. We do not think so. It was but an indication that the court considered that the question epitomized the evidence up to that time introduced, but without any opinion as to the weight of such evidence. If the objection had been properly made that the question in particulars stated was not supported by any evidence yet introduced, the court by the act of overruling the objection would have in effect made the same statement. It is not every remark made orally by the trial judge during the progress of a case which falls within the inhibition against oral instructions. It has been held that the trial judge may state at length his reasons for ruling on a question of law and it is not error to do so in the presence of the jury. (*Hall v. Aitkin*, 25 Neb., 360.) Such a remark as was here made is not prejudicial if it be not of such a character as to influence the minds of the jurors in determining facts presented to them. At the close of the plaintiff's evidence the defendant moved for the direction of a verdict, and this motion was overruled. Counsel for plaintiff now aptly suggests that if the remark referred to was erroneous, the very act of overruling this motion must have been erroneous for the same reason, because it implied that the court consid-

ered the evidence sufficient to warrant a verdict for the plaintiff.

Among the instructions given was the following: "If you find for the plaintiff, then, in estimating his damages, you are instructed that he is entitled to recover any pecuniary loss he has sustained on account of being unable to work, either wholly or in part. If he has suffered permanent injury that will prevent him from pursuing his ordinary business or labor in future to the same extent that he did prior to the injury, that should be taken into account. He is also entitled to recover on account of bodily pain and suffering, and for expenses of his treatment, including physicians' charges. You should take all these elements into consideration and allow him such sum as will be fair and just compensation for the injuries sustained; but you cannot allow him exemplary damages; that is, damages by way of punishment of the defendant." We agree with counsel for the railway company that to recover prospective damages it must be made to appear from the evidence with reasonable certainty that future evils will result; and we also agree with them in their contention that the record discloses no evidence of a permanent disability affecting plaintiff's ability to pursue his ordinary business in the future. It follows that the instruction just quoted, in so far as it submitted to the jury a consideration of a permanent disability affecting plaintiff's future business, was technically erroneous. The most difficult question in the case is whether the error was prejudicial. The verdict was for \$1,500. Prior to the injury the plaintiff was a man of sound health, able to perform manual labor at remunerative wages. For four weeks at least he was confined to his bed. For several months thereafter he could only move with the aid of crutches. Down to the time of trial he experienced pain, and while for some time prior to the trial he had been working, he had been compelled to resort to a different class of work and procure assistance to re-

Chicago, R. I. & P. R. Co. v. Archer.

lieve him of the severer tasks. At the time of the trial these conditions continued, and there was evidence tending to show that they might continue for two years. In *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27, the jury found a verdict of \$7,000. This court held that there was no sufficient evidence of a permanent disability resulting from the injuries complained of; but permitted a judgment of \$2,000 to stand on plaintiff's remitting the remainder. The propriety in such cases, even where damages are unliquidated, of permitting the defendant in error to elect between a remittitur and a judgment of reversal, has not, so far as we know, ever been questioned in this state. If this verdict were for so large a sum that it was evident or even probable that a portion of the damages had been allowed on account of supposed permanent injuries, there would, therefore, be no doubt that the judgment should be of this character, the court estimating as the amount of the remittitur as great a sum as it was probable that the jury might have allowed on account of the element improperly submitted. But here we cannot pursue this course. In the *Brady* case a judgment \$500 greater than that here allowed was permitted to stand for temporary injuries, apparently no more serious than those disclosed in this case, and we would not feel warranted in requiring as a condition of affirmance a remittitur beyond a nominal sum. On the other hand, had the verdict been for \$5 or \$100, or even any sum not beyond what might be equal to what may be called the liquidated elements of damages proved, to-wit, expenses occasioned by the injury and actual loss of earnings already sustained, we would unhesitatingly affirm the judgment unconditionally as beyond all question not including anything for permanent disability. We think the true rule is that where the damages are unliquidated and the jury has been by the instructions permitted to consider an element not sustained by the evidence, the error should be treated as harmless where, from an inspection of

Spatz v. Martin.

the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the elements improperly submitted to it. We think this case discloses a state of affairs within the rule.

JUDGMENT AFFIRMED.

L. E. SPATZ V. J. A. MARTIN.

FILED JANUARY 22, 1896. No. 5988.

Negotiable Instruments: SURETYSHIP: LIABILITY OF MARRIED WOMEN. Evidence in an action against a married woman upon a note executed by her as surety examined, and held sufficient to sustain a verdict against her.

ERROR from the district court of Kearney county. Tried below before BEALL, J.

J. L. McPheely and *H. M. Pope*, for plaintiff in error.

In argument reference was made to the following cases: *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 84; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Hale v. Christy*, 8 Neb., 264; *Webb v. Hoselton*, 4 Neb., 308; *Barnum v. Young*, 10 Neb., 309; *Gillespie v. Smith*, 20 Neb., 455.

A. H. Burnett, contra.

IRVINE, C.

J. E. Spatz and L. E. Spatz, his wife, gave to J. P. Adams their promissory note for \$254. This note was indorsed by Adams to Martin, and the makers and indorser were sued by Martin. A judgment by him was recovered. Mrs. Spatz brings the judgment here for review

Spatz v. Martin.

by petition in error. Her defense was coverture. The case was submitted to the jury on an instruction to the effect that if Mrs. Spatz signed the note as surety, without reference to her separate estate, and was a married woman, then she was not liable. There is no assignment of error relating to the instruction, and the sole question presented for review is whether the verdict was, under this instruction, sustained by the evidence.

It is settled that a married woman may in this state obligate herself as surety for her husband's debt. (*Stevenson v. Craig*, 12 Neb., 464; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 123; *Smith v. Spaulding*, 40 Neb., 339; *Briggs v. First Nat. Bank*, 41 Neb., 17; *Watts v. Gantt*, 42 Neb., 869.) The effect of other decisions is that under our married woman's act a married woman is liable upon her contracts when made with reference to and upon the faith and credit of her separate property. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Barnum v. Young*, 10 Neb., 309.) In some cases this rule is stated in the alternative, to-wit, that she is bound upon contracts made with reference to her separate estate or upon the faith or credit thereof. (*State Savings Bank of St. Joseph, Mo., v. Scott*, 10 Neb., 83; *Eckman v. Scott*, 34 Neb., 817.) In such cases it has been held that she is liable upon her general obligations, not in their nature connected with her separate estate, when she intended to bind it for their performance. It is not necessary in this case to consider the distinction suggested by the use of the conjunctive term in some cases and the disjunctive in others, because, as already stated, no complaint is made of the instruction, and we need only consider the sufficiency of the evidence, in connection with the instruction and the general statements of the law afforded by the cases cited.

The evidence tends to show that J. E. Spatz was a physician who had performed professional services for the wife of Adams. He had been charged with negligence in his

Sweeney v. Ramge.

treatment of her, and in settlement of this controversy had given the note sued upon, his wife joining him in its execution. She testified in answer to direct questions that she did not sign the note with reference to her separate estate, and did not intend to bind it; but, on the other hand, there is evidence, both from her and her husband, to the effect that while the husband enjoyed a good practice, all the property was in her name; that she had previously signed notes as surety; that she knew the object of giving this note, and that it was necessary for him to give security for it. She testified that she presumed she was asked to sign the note because she owned the property. She believed that that was the reason why her signature was desired. It further appeared that her owning the property was the reason urged upon Adams for accepting her as surety, although this conversation was not in her presence. We think this was sufficient evidence to sustain the verdict. The jury was not bound by her direct denial of the fact that she did intend to bind her separate property. It had a right to believe from the evidence that when she had signed the note, owning all the property of the family, and knowing that her signature was desired because of that fact, her intention was to charge that property.

JUDGMENT AFFIRMED.

MORTIMER C. SWEENEY v. FRANK J. RAMGE.

FILED FEBRUARY 4, 1896. No. 6153.

Affirmance Where the Record Fails to Present a Question for Review.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

C. A. Baldwin and Weaver & Giller, for plaintiff in error.

Parke Godwin, contra.

PER CURIAM.

The bill of exceptions in this case having been quashed at a former term of this court, and the petition in error presenting no question which can be considered without a bill of exceptions, the judgment is

AFFIRMED.

INDEX.

Abandonment. See SALES, 8.

Abatement.

A plea that another action is pending in the same court between the same parties, involving the same subject-matter and seeking the same relief, when proved, is a good defense to a second action, though one is an action at law and the other a suit in equity. *Monroe v. Reid*..... 317

Abortion. See WITNESSES, 3.

Abstracts of Title.

1. The bond required by sec. 65, ch. 73, Comp. Stats., is designed as security for those who may be damaged through the negligence or inefficiency of abstracters. *Thomas v. Carson* 765
2. A certificate that the abstract mentions all the liens of record in the offices of the county clerk, clerk of the district court, and county treasurer does not make the abstracter liable on his bond for a failure to mention a mortgage recorded in the register's office, though the omission was intentional and the purchaser of a junior mortgage relied upon the abstract. *Id.*

Accessories. See CRIMINAL LAW, 2.

Accord and Satisfaction.

A defendant who pleads accord and satisfaction must allege performance. *Goble v. American Nat. Bank of Kansas City*, 891

Accounting. See BANKS AND BANKING, 7.

Confirmation of report of referee who stated an account. *Warren v. Raben* 115

Actions. See ABATEMENT. ATTACHMENT, 4. ATTORNEY AND CLIENT, 2. MALICIOUS PROSECUTION. RES ADJUDICATA. SALES, 4, 5. WILLS.

A promise by one to another for the benefit of a third person may be enforced by the latter. *Kaufmann v. Cooper*..... 644

Administration of Estates. See EXECUTORS AND ADMINISTRATORS.

Adverse Possession.

Occupancy of land by permission of, and subservient to, the true owner will not establish a title by adverse possession.

Johnson v. Butt 220

Affidavits. See REPLEVIN, 3, 4. REVIEW, 15.

Alfalfa Irrigation District. See IRRIGATION.

Amendments. See RECORDS. REPLEVIN, 3, 4. STATUTES, 2.

Appeal. See REVIEW.

Appeal Bonds. See INJUNCTION, 1, 2.

The allowance of a supersedeas is within the discretion of the trial court where a peremptory writ of *mandamus* has been allowed. *Cooperrider v. State*..... 84

Appearance. See CONTEMPT, 7.

Appointments. See OFFICE AND OFFICERS, 5, 6.

Appraisements. See EXECUTIONS, 8-11, 16, 17.

Arguments. See CRIMINAL LAW, 37. REVIEW, 27-29.

Arrest. See SHERIFFS AND CONSTABLES, 3-6.

Arson.

Under sec. 54, Criminal Code, it was erroneous to try defendant upon the charge of burning a schoolhouse, joined with a charge for causing the burning to be done by another. *Wendell v. State*..... 823

Assault. See ROBBERY.

Assault and Battery.

Sufficiency of evidence to sustain a conviction for assault and battery. *Whitner v. State*..... 144

Assessments. See INJUNCTION, 4.

Assignments of Error. See INSTRUCTIONS, 1. REVIEW, 30-32.

Attachment. See ELECTION OF REMEDIES.

1. The goods of a merchant may be attached on the ground of a fraudulent disposal of property, where he expresses an intention to defeat the claim of a creditor, arranges to carry out his purpose, sells his goods rapidly for cash, greatly depletes the value of his stock in a short time, and fails to give a satisfactory account of the money realized. *Reed v. First Nat. Bank of Weeping Water*..... 168
2. Validity of levy of writ. *Powell v. Yeazel*..... 227
3. On discharge of an attachment the costs and expenses

Attachment—concluded.

incident thereto should ordinarily be taxed against the plaintiff. *Deering v. Wisherd*..... 720

4. Jurisdiction over property lawfully seized under a writ of attachment is not lost by a failure to serve upon defendant process in the main, pending action. *Darnell v. Mack*.... 740

Attorney and Client. See WITNESSES, 5.

1. An attorney has a right to refuse a retainer which would require his appearance before a particular judge. *Hawes v. State*..... 149
2. Under an allegation that an attorney received for the use of plaintiff, but not pursuant to a contract between them, money paid by a judgment debtor, which defendant wrongfully retained, it is error to instruct the jury that a reasonable sum may be allowed for professional services, where defendant answers that he retained only the sum due him under a contract with plaintiff. *Wigton v. Smith*, 461

Attorney General. See CONSTITUTIONAL LAW, 3.

Attorneys. See CONTRACTS, 14. COUNTY ATTORNEYS.
CRIMINAL LAW, 35. REVIEW, 30, 34.

Auditor of Public Accounts. See MANDAMUS, 7.**Australian Ballot Law.** See ELECTIONS.**Bailment.** See LARCENY, 4.**Ballots.** See ELECTIONS, 9.**Banks and Banking.** See NEGOTIABLE INSTRUMENTS, 8.
USURY.

1. The law presumes that the relation existing between a bank and its customer is that of debtor and creditor. *Nichols v. State*..... 715
2. In the absence of evidence the law presumes that the deposit of a customer is a general one. *Id.*
3. Where a customer overdraws his account and makes a general deposit, the presumption is that it was made and received in payment of the overdraft. *Id.*
4. A cashier, with knowledge of the bank's insolvency, cannot be convicted of a felony under secs. 22, 23, ch. 8, Comp. Stats., for accepting a deposit to apply on the depositor's overdraft. *Id.*..... 716
5. In a prosecution against the cashier of an insolvent bank for accepting a deposit, evidence may be admitted to show it was made and received in payment of the depositor's overdraft. *Id.*

Banks and Banking—concluded.

6. In an action against a bank for deposits made by plaintiff's agent in his own name, evidence that the money was paid out on defendant's checks is inadmissible under a general denial. *Cady v. South Omaha Nat. Bank*..... 756
7. Where a commission merchant, whose bank account is overdrawn, deposits in his own name funds realized from a sale of live stock consigned to him by his principal, the bank, regardless of the question of notice, is accountable to such principal and cannot apply the funds to the payment of the overdraft. *Id.*

Bill of Exceptions. See REVIEW, 13-20.

1. Bill of exceptions quashed because not presented to the trial judge for settlement within the time prescribed by statute. *Conway v. Grimes*..... 288
2. After a bill of exceptions has been quashed it cannot be considered. *Id.*
City Nat. Bank of Hastings v. Thomas..... 861
3. The supreme court will not make an order on a stenographer below to prepare a transcript of evidence for a bill of exceptions where the district judge made such an order upon condition that the fees should be paid, there being shown neither a compliance with the order nor an attempt to review it. *Argabright v. State*..... 822

Blind, Institution for. See OFFICE AND OFFICERS, 2.**Board of Public Lands and Buildings. See PENITENTIARY.**

The board of public lands and buildings may transact much of the business pertaining to the public institutions of the state through agents of its own creation. *State v. Holcomb*, 614

Bonds. See ABSTRACTS OF TITLE. CONSTITUTIONAL LAW, 7. INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 2. OFFICE AND OFFICERS, 5-7. PRINCIPAL AND SURETY, 2, 3.

Bridges. See COUNTIES, 8-10.**Briefs. See REVIEW, 27-29, 34.****Building Contracts. See CONTRACTS, 12.****Burden of Proof. See CHATTEL MORTGAGES, 4, 5. FRAUDULENT CONVEYANCES, 1.****Burglary. See INDICTMENT AND INFORMATION, 5.**

1. Evidence in respect to the element of intent held suffi-

Burglary—concluded.

- cient to sustain a verdict against defendant. *McMahon v. State* 166
2. Evidence *held* sufficient to establish that the burglary was committed in the night season. *Metz v. State*..... 547
3. A corn-crib erected on a farm is a storehouse and warehouse within the meaning of sec. 48, Criminal Code, defining burglary. *Id.*
4. A breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to entering is removed. *Id.*
5. The facts that a burglary was committed and the stolen property soon found in possession of accused do not raise a presumption that he is guilty of the crime. *Id.*
6. The inference to be drawn from the facts that a burglary was committed and the stolen property soon found in possession of accused is a question for the jury to determine. *Id.* 548

Calendar Month. See CONSTITUTIONAL LAW, 9, 10.

Carriers.

1. It is not within the power of a court to make such an arrangement for the business intercourse of common carriers as, in the opinion of such court, they ought to make for themselves. *State v. Sioux City, O'N. & W. R. Co.*..... 683
2. The transfer switch law (Session Laws, 1893, p. 142, ch. 11) is invalid, as violating the fourteenth amendment of the federal constitution providing that no state shall "deprive any person of life, liberty, or property without due process of law." *Id.*

Challenge. See JURY, 1.

Chattel Mortgages.

Release.

1. A chattel mortgage may be discharged by a marginal entry on the index by the mortgagee, attested by the county clerk, or the entry may be made by the latter when authorized to do so by a written order of the mortgagee attested by a justice of the peace or an officer having a seal. *Boyes v. Summers*..... 308
2. An order to a county clerk to release a mortgage is invalid as a release unless attested by a justice of the peace or an officer having a seal. *Id.*
3. Mistake or ignorance will not release a mortgagee from

Chattel Mortgages—concluded.

liability for failing to satisfy a mortgage as required by
sec. 15, ch. 32, Comp. Stats. *Id.*

Bona Fides.

4. In a contest between mortgagee and mortgagor's creditors the burden is upon the former to establish the *bona fides* of the mortgage where he has not taken possession of the chattels. *Darnell v. Mack*..... 740
5. Mortgagee's burden of proof as to the *bona fides* of the mortgage is not satisfied by showing that the notes secured are in existence, without evidence of the consideration therefor or of the *bona fides* of the debt. *Id.*
6. A mortgagee of a conditional buyer in possession of chattels is not a purchaser within the meaning of sec. 26, ch. 32, Comp. Stats. *Campbell Printing Press & Mfg. Co. v. Dyer* 830

Title to Chattels.

7. The legal title to mortgaged chattels remains in the mortgagor. *Gould v. Armagost* 897
8. A purchaser of mortgaged chattels at execution sale was entitled to possession of the property, where he tendered to the mortgagee the debt secured by the mortgage. *Id.*

Circumstantial Evidence. See CRIMINAL LAW, 13.

Collateral Attack. See ESTOPPEL, 1. JUDGMENTS, 3.

Comity, Judicial. See STARE DECISIS.

Commission Merchants. See BANKS AND BANKING, 7.

Commissions. See REAL ESTATE AGENTS.

Commitment. See CONTEMPT, 12.

Common Carriers. See CARRIERS.

Complaints. See CONTEMPT, 13.

Conditional Sales. See SALES, 7.

Confession of Judgment. See JUDGMENTS, 8.

Confessions. See HOMICIDE, 7.

Consideration. See CONTRACTS, 6, 7, 11. LANDLORD AND TENANT, 3. NEGOTIABLE INSTRUMENTS, 5, 6.

Conspiracy.

Thomas v. Carson 771

Constables. See SHERIFFS AND CONSTABLES.

Constitutional Law. See MANDAMUS, 1. OFFICE AND OFFICERS, 3, 9. STARE DECISIS. TAXATION.

Construction.

1. Construction of sec. 11, art. 3, of the constitution relating to subjects and titles of bills. *Van Horn v. State*..... 62
2. A contemporaneous construction adhered to for many years by the legislative and executive departments of government will not be disregarded by the courts and in doubtful cases will generally be conclusive. *State v. Holcomb*..... 88
3. Weight to be given the attorney general's construction of a constitutional provision. *McGinn v. State*..... 440

Contracts.

4. The legislature has no power to impair the obligation of contracts. *State v. Thayer*..... 137

Arguments.

5. A party in the supreme court, who relies upon the unconstitutionality of a statute, should point out in his brief the section of the constitution which the law infringes. *Boyes v. Summers*..... 308

Due Process of Law.

6. Meaning of the term "due process of law" as used in sec. 3, art. 1, of the constitution. *Board of Directors of Alfalfa Irrigation District v. Collins*..... 411
7. The irrigation law (Session Laws, 1895, p. 269, ch. 70), providing for the organization of irrigation districts, and for voting bonds, does not contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the state or federal constitution. *Id.*

Legislation.

8. The district irrigation law is not unconstitutional on the ground that the power conferred upon districts to levy taxes is without limitation; nor on the ground that it confers legislative power upon county boards. *Id.*..... 412

Time Laws Go Into Effect.

9. The term "calendar month" is used in sec. 24, art. 3, of the constitution in the sense in which it was understood prior to the adoption of that instrument. *McGinn v. State*..... 427
10. The term "calendar month" denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. *Id.*

Validity of Statutes.

11. The provision of sec. 32, Session Laws, 1870, p. 31, that

Constitutional Law—*concluded.*

- all transactions and dealings of the state penitentiary shall be conducted in the name of the warden, conflicts with sec. 19, art. 5, of the constitution of 1875, creating the board of public lands and buildings, and defining their duties. *State v. Holcomb*..... 612
12. The provision of sec. 21, ch. 7, Comp. Stats., for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies, does not conflict with sec. 10, art. 1, of the constitution relating to criminal prosecutions. *Korth v. State*, 631
13. Ch. 11, Laws of 1893, requiring railroad companies, without the right of judicial investigation, to carry freight over longer lines at the rates for carrying it over shorter lines between the same points, conflicts with the fourteenth amendment of the federal constitution prohibiting a state from depriving a person of property without due process of law. *State v. Sioux City, O'N. & W. R. Co.*..... 683
14. The act of February 25, 1875 (Session Laws, p. 38), amending sec. 498 of the Code so as to confer upon district judges at chambers authority to confirm judicial sales, is constitutional. *Beatrice Paper Co. v. Beloit Iron Works*..... 901

Construction. See CONSTITUTIONAL LAW. STATUTES.
WILLS.

Contempt.*Construction.*

1. The rules of strict construction applicable to procedure in criminal cases should govern proceedings in contempt. *O'Chander v. State*..... 10
Zimmerman v. State..... 13

Injunctions.

2. Under sec. 260 of the Code a judge of the district court, upon a proper information, has jurisdiction to try and sentence for contempt one who violated an injunction. *Zimmerman v. State*..... 14

Review.

3. A judgment for contempt may be reviewed on error in the same manner as criminal cases. *Id.*
4. A record to review proceedings for contempt must show that the errors complained of were submitted to the court below by motion for a new trial. *Id.*
5. Formal defects in an information or order for arrest will be deemed waived unless objected to before trial. *Id.*

Contempt—concluded.

6. Presumptions and intendments will not be indulged in order to sustain convictions for contempt of court. *Hawes v. State*..... 149
- Cooley v. State*..... 604

Attorneys.

7. A candid statement by an attorney, in respectful language, of his reasons for refusing to appear before a particular judge, will not, of itself, sustain a conviction on the charge of contempt. *Hawes v. State*..... 149

Evidence.

8. To sustain a conviction for contempt it should appear that the language or conduct of accused was either contemptuous *per se* or employed in a culpable sense. *Id.*

Witnesses.

9. One called as a witness, who, on being ordered to be sworn or affirmed, contumaciously refuses, is guilty of contempt. *Wilcox v. State*..... 402
10. A witness should not be punished merely for refusing to be sworn unless it is shown that he also refused to be affirmed. *Id.*
11. A witness who contumaciously refuses to answer legal and proper questions is guilty of contempt. *Id.*
12. Where a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment. *Id.*

Complaint.

13. A complaint for constructive contempt is insufficient where it fails to state the facts constituting the alleged offense. *Cooley v. State*..... 603
- Galligher v. State*..... 608

Continuance. See CRIMINAL LAW, 11. REVIEW, 17.

1. Where a party moves for a continuance to meet evidence unexpectedly adduced, he must show that he expects to procure evidence to meet the new features, and the nature of the evidence. *Dixon v. State*..... 299
2. A litigant, in his motion for a new trial, cannot complain because the case was tried in absence of his witnesses where he failed to make an objection, on that ground, to proceeding with the trial. *Kreamer v. Irwin*..... 827
3. A ruling of the district court upon a motion for continuance will not be disturbed on review except for an abuse of discretion. *Keens v. Robertson*..... 837

Contracts. See ATTORNEY AND CLIENT, 2. CARRIERS, 1. LANDLORD AND TENANT. MECHANICS' LIENS. SET-OFF AND COUNTER-CLAIM, 2. TIME.

School Lands.

1. The legislature cannot take away the right of a lessee of school land to select an arbitrator, as provided by his lease, to reappraise the land at the end of five years. *State v. Thayer*..... 137

Pleading.

2. On a petition alleging merely a special contract and performance by plaintiff, he cannot recover on a *quantum meruit* for part performance. *Mayer v. Ver Bryck*..... 221

Sales.

3. Where hay to the amount of 420 cubic feet was sold for a ton, evidence that it weighed less than a ton should be excluded. *Smith v. Brown*..... 230
4. Sufficiency of evidence to show the abandonment of a contract of sale. *Hall v. Eccles*..... 880
5. A party who contracted to purchase property may be released therefrom by a subsequent parol agreement to that effect, any time while the contract remains wholly executory. *Bryant v. Thesing*..... 244
6. The mutual waiver of the rights of the parties to a contract of sale of personal property is a sufficient consideration for an agreement to cancel the contract. *Id.*

Consideration.

7. An action cannot be maintained on a contract where the consideration is wicked or prohibited by law. *Storz v. Finklestein*..... 577
8. Case where plaintiff was not entitled to recover in an action for the price of beer, because it was sold under a contract requiring the purchaser to violate the statute relating to liquor licenses. *Id.*
9. Contract set out in opinion held a mere appointment of an agent of the state to lease the convict labor to third persons and to disburse the funds appropriated for the support of the penitentiary. *State v. Holcomb*..... 615
10. Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon. *Id.*
11. The granting of a contract for the construction of a public building is a sufficient consideration for a contractor's promise to pay all claims of laborers and material-men. *Kaufmann v. Cooper* 644

Contracts—concluded.

Public Buildings.

12. Officers may, without statutory authority, insert in a contract for erecting a public building and in the builder's bond a provision to secure payment of the claims of laborers and material-men. *Id.*

Damages.

13. Evidence held sufficient to sustain a verdict for defendant in an action against him for wrongfully refusing to permit plaintiff to complete a contract. *Kreamer v. Irwin*..... 827

Attorneys.

14. Stipulations of counsel in regard to the trial of a cause are not to be treated as contracts enforceable under all circumstances, but may be set aside by the court. *Keens v. Robertson*..... 837

Conditional Sales.

15. A contract for the sale of personalty, upon condition that there is to be no change in the title until payment of the purchase price, is valid as between the parties, and valid as against a third person dealing with the property without notice, unless the latter is a purchaser, judgment or attaching creditor of the conditional buyer. *Campbell Printing Press & Mfg. Co. v. Dyer* 830

Contribution. See PRINCIPAL AND SURETY, 1.

Conversion. See EMBEZZLEMENT. LARCENY, 3.

Conveyances. See MUNICIPAL CORPORATIONS, 1. RAILROAD COMPANIES, 1, 2.

Description of land. *Hubermann v. Evans* 784.

Convict Labor. See PENITENTIARY.

Corporations. See COUNTIES. EMBEZZLEMENT, 1, 2. EVIDENCE, 1. IRRIGATION, 1. PRINCIPAL AND AGENT, 2. REPLEVIN, 4. WATER COMPANIES.

1. Where a failing partnership incorporates, and the corporation receives the assets and continues the former's business, the latter is presumptively liable for the partnership debts. *Reed v. First Nat. Bank of Weeping Water*..... 168

Liability of Stockholders. Stock. Payment.

2. After corporate property has been exhausted, a stock subscriber is individually liable to creditors to the extent of his unpaid subscriptions, and the liability follows the stock. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*..... 333
3. The capital, including unpaid stock subscriptions, is a trust fund for the payment of creditors. *Id.*

Corporations—concluded.

4. Property or labor accepted in payment for stock must equal in value the face of the stock. *Id.*..... 334
5. Subscriptions for stock may be paid in such property as the corporation may lawfully acquire and hold, or in labor for corporate purposes. *Id.*
6. The value of property conveyed to a corporation in payment of stock may be fixed by the parties where they act in good faith or in the fair exercise of judgment and discretion honestly directed. *Id.*
7. Where property conveyed in payment of subscriptions for stock is intentionally overvalued, the subscriber may be held liable to creditors of the corporation for the difference between its real value and the fictitious value agreed upon by the parties to the conveyance. *Id.*
8. Sufficiency of petition by creditors of a corporation to recover from stockholders the difference between the real value of property conveyed in payment of corporate stock and the fictitious value agreed upon by the parties to the conveyance. *Id.*
9. A stranger is not charged with the duty of ascertaining from the books of the corporation, before extending it credit, whether the subscriptions for stock have been paid. *Id.*

Seals.

10. Municipal and private corporations may, in absence of limitations express or implied, as an incident to their general corporate powers, adopt and use a common seal. *Board of Directors of Alfalfa Irrigation District v. Collins*, 412

Subscriptions.

11. The mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed. *Hards v. Platte Valley Improvement Co.*... 709
12. Where a defendant in a suit on a subscription files a counter-claim alleging that he was induced to subscribe through a promise that capital stock to the amount subscribed would be issued to him, he must aver payment or tender before he can claim anything by reason of plaintiff's failure to issue the stock. *Nebraska Exposition Association v. Townley*..... 893

Costs.

- An officer under a writ of attachment may lawfully return as costs the actual, necessary, and reasonable charges and expenses incurred in taking, removing, and preserving the attached property. *Deering v. Wisherd*..... 720

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See EMBEZZLEMENT, 11.

Officers' Fees. County Boards.

1. The county board, under the laws in force in 1883, exercised ministerial functions in examining the reports of fees received by the county clerk and in adjusting the account between him and the county. *Heald v. Polk County*..... 28
Ragoss v. Cuming County..... 36
2. The examination and adjustment by the county board of reports of fees received by the county clerk and the subsequent allowance of the clerk's claim for making the county tax list are independent transactions. *Id.*
3. After settlement with the county clerk and the retention by him, from fees collected, of the full amount of his salary, the county board, in allowing him a further sum for making the county tax list, acted judicially and within its jurisdiction; and its decision, unless appealed from, is final. *Id.*
4. A county board is vested with exclusive, original jurisdiction to hear and determine all claims filed against the county. *Id.*
5. Under the statute in force in 1883 county clerks of counties having less than twenty-five thousand inhabitants were not entitled to extra compensation for making county tax lists. *Id.*
6. Construction of sec. 42, ch. 28, Comp. Stats., in relation to compensation of certain county officers and their deputies. *Wolfe v. Kyd*..... 292

Supervisors.

7. Ch. 28, Session Laws, 1895, provides for seven supervisors in all counties under township organization. *Van Horn v. State* 63

Bridges.

8. Prior to the enactment of ch. 72, Session Laws, 1887, a county under township organization was not invested with power, nor charged with the duty, of building or repairing bridges in the county. *Tullock v. Webster County*..... 211
9. It was not intended by ch. 72, Session Laws, 1887, to make counties under township organization liable for the payment of bridges already constructed, nor for the payment of repairs made before the act went into effect. *Id.*
10. A petition to recover more than one hundred dollars from a county for labor and material furnished for a bridge built in 1887 was held insufficient, where it failed to allege that

Counties—concluded.

the bridge was in the county; that when the contract was made there was money on hand to pay for the improvement; and that the county advertised for bids. *Id.*

11. The contract referred to in the preceding paragraph was held to be *ultra vires* and incapable of ratification by the county. *Id.*

Bonds.

12. The antedating of county bonds under the circumstances referred to in the opinion was not a substantial defect. *State v. Moore* 590

Relocation of County Seat.

13. A county seat can only be relocated by a three-fifths vote of all the electors of the county at an election held for that purpose. *State v. Roper* 724
14. The law presumes that all the electors of the county vote at an election to relocate a county seat. *Id.*
15. On application for *mandamus* to compel the removal of a county seat pursuant to the declared result of an election, an answer tendering only issues as to fraud in the election presents no defense. *Id.* 730

County Attorneys. See CRIMINAL LAW, 35, 36.

The provision of sec. 21, ch. 7, Comp. Stats., for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies is applicable to informations under sec. 579, Criminal Code.

Korth v. State 631

County Boards. See COUNTIES. RES ADJUDICATA.**County Bonds.** See COUNTIES, 12.**County Clerks.** See CHATTEL MORTGAGES, 2. COUNTIES.**County Courts.**

A county court has power to open the settlement of a former account of an executor to correct any mistake therein, except as to disputed items previously heard and determined.

Merrick v. Kennedy 264

County Judge.

Where a vacancy occurs in the office of county judge, and the unexpired term exceeds one year, it should be filled by election. *State v. Lansing* 515

County Seat. See COUNTIES, 13-15.**Court Records.** See RECORDS.

Courts. See CARRIERS, 1. CONTEMPT, 7. COUNTIES, 4. COUNTY COURTS. JURISDICTION. JUSTICE OF THE PEACE. STARE DECISIS. SUPREME COURT.

Covenants. See MUNICIPAL CORPORATIONS, 1.

Creditors' Bill.

1. As a condition precedent to recover, plaintiff in a creditors' bill must plead and prove that he is the owner of a valid and unsatisfied judgment. *Johnson v. Parrotte*..... 52
2. The right to bring an equitable action in the nature of a creditors' bill was not superseded by the statute providing for proceedings in aid of execution. *Monroe v. Reid*..... 317

Crimes.

A crime is a wrong of which the law takes cognizance as injurious to the public, and punishes in a proceeding in the name of the state. *Bohner v. Bohner*..... 204

Criminal Law. See BANKS AND BANKING, 4, 5. CONSTITUTIONAL LAW, 12. CONTEMPT. COUNTY ATTORNEYS. EMBEZZLEMENT. FORGERY. HOMICIDE. INSTRUCTIONS, 15-32. REVIEW, 30. ROBBERY. SHERIFFS AND CONSTABLES, 3, 4.

Judgments.

1. Where the record for review is without error, except an irregularity in entering judgment, the cause may be remanded with instructions to the lower court to enter a proper judgment on the verdict. *Griffen v. State*..... 282

Accessories.

2. One who is present when a crime is committed, aiding and assisting therein, is a principal, though his hand was not the instrument through which the crime was perpetrated. *Dixon v. State*..... 299

Sentence.

3. Before sentencing a convict the court is not limited to the single inquiry, "Have you anything to say why judgment should not be pronounced against you?" *Tracey v. State*... 362
4. In pronouncing judgment upon a convict the court has no authority to coerce from him answers to inquiries. *Id.*

Harmless Error.

5. A judgment should not be reversed for error not prejudicial. *Id.*

Motion for New Trial.

6. Alleged errors in overruling challenges to jurors for cause will not be reviewed by the appellate court unless presented below by the motion for a new trial. *Ford v. State*..... 390

Criminal Law—continued.*Charge.*

7. A charge of the court that every sane person is presumed to intend the natural and probable consequences of his voluntary acts, *held correct. Id.*

Imprisonment.

8. The confinement of a convict from the date of conviction until the date fixed for his execution is not a part of the penalty for a capital offense. *McGinn v. State* 427

Former Jeopardy.

9. Where one convicted of a felony procures a reversal of the judgment on account of error in the proceedings, he waives his right to object to further prosecution on the ground of former jeopardy. *Id.*

Pleading.

10. Where a plea to the general issue has been entered and has not been withdrawn, a plea in abatement need not be entertained. *Korth v. State* 632

Continuance.

11. It is error for the court to refuse to postpone trial for a reasonable time to enable defendant to meet testimony of a witness whose name was indorsed on the information after it was filed, where the latter gave material testimony for the state during the examination in chief. *Rauschkolb v. State* 658

Evidence.

12. In reviewing the rulings of the trial court in admitting and rejecting evidence the supreme court will confine its examination to the objections made below. *Collins v. State* 37
13. A verdict of guilty is supported by the evidence when the circumstances proved lead beyond a reasonable doubt to inferences of facts essential to establish defendant's guilt. *Dixon v. State* 298
14. An objection relating to the materiality or relevancy of testimony should be made when the testimony is offered. *Ford v. State* 390
15. An order excluding an answer during the examination in chief will not be reviewed where the record fails to show an offer to prove the fact the answer would elicit. *Id.*
16. It is not reversible error to exclude testimony offered to prove a fact established by uncontradicted evidence. *Id.*
17. The effect of the evidence and the inferences deducible therefrom are for the jury. *Williams v. State* 704

Criminal Law—continued.

18. The omission of the trial court to instruct the jury that the failure of defendant to testify creates no presumption against him, is not a ground for reversal, where defendant did not request such an instruction. *Metz v. State*..... 547

Preliminary Proceedings. Variance.

19. An objection that the offense charged in the indictment differs from that in the complaint should be made by plea in abatement and not by motion to quash. *Whitner v. State*, 144
20. Testimony on the trial should not be rejected on the ground that the witness testified differently during the preliminary examination. *Dixon v. State*..... 299
21. Where the transcript of the preliminary proceedings has been lost from the files of the district court another transcript may be substituted by order of the court. *Korth v. State*..... 632
22. The record of the proceedings in the examining court held sufficient to show a compliance with sec. 585 of the Criminal Code relating to preliminary examinations. *Id.*

Penalties.

23. It was not error to submit to the jury the question of defendant's guilt of a higher grade of offense than that for which conviction is had, where there is evidence to sustain the higher grade. *Whitner v. State*..... 144
24. A refusal to instruct as to the statutory penalty, or to permit that question to be argued, is not error, where the jury is not required to fix the punishment. *Ford v. State*, 390
Lawhead v. State..... 607

Review.

25. A ruling below on motion to compel an election as to whether the case in which it was filed or another case involving the same offense should be dismissed cannot be reviewed in the supreme court in absence of a showing that two such cases were in fact pending. *Lindsay v. State*..... 177

Verdict.

26. A verdict of guilty, responsive separately to each of two counts of an information, both counts charging one crime, should be treated, in entering judgment, as though both elements of the crime had been embraced in a single count. *Griffen v. State*..... 282

Separate Trials.

27. On motion of the state or a defendant, persons jointly indicted for a felony may be separately tried. *Metz v. State*... 547

Criminal Law—continued.

28. Where defendants were jointly indicted, it is too late to object to a severance after the jury has been selected. *Id.*

Election as to Counts.

29. Under an information charging several distinct embezzlements, the action of the trial court, in withholding its ruling upon defendant's motion to require an election as to counts until the state introduced its evidence in chief, was held not an abuse of discretion, where the motion was sustained. *Korth v. State*..... 632

Conflicting Evidence.

30. Facts determined by the district court upon contradictory affidavits will be presumed by the supreme court to have been established by the proofs. *Grossman v. State*..... 21
31. Where the evidence as to the alleged misconduct of jurors is conflicting, the finding of the trial court thereon will not be disturbed. *McMahon v. State*..... 166
32. A ruling in the district court upon a question of fact presented by a motion supported by affidavits will not be disturbed in the supreme court, unless it is without support of sufficient evidence. *Lindsay v. State*..... 177
33. In considering a motion for a new trial the court is not obliged to accept as true an uncontradicted statement in an affidavit impeaching the conduct of the jury, but may weigh against the statement the presumption that the jurors obeyed their oaths. *Tracey v. State*..... 361
34. Mere statements of counsel in argument, though contained in a bill of exceptions, cannot be considered as evidence. *Grossman v. State*..... 21

Misconduct of County Attorney.

35. Alleged misconduct of the county attorney in using improper language during his argument to the jury held not prejudicial to the rights of defendant. *McMahon v. State*... 166
36. Case where the prosecuting attorney in a trial for murder conversed with a juror in violation of an order of the court, and the overruling of a motion for a new trial, based on that ground, was not reversible error. *Lindsay v. State*.... 177

Arguments.

37. It is within the discretion of the trial court to limit the time for arguments before the jury. *Dixon v. State*..... 299

Discharge of Prisoner.

38. The term at which a person was indicted should be excluded in construing sec. 391, Criminal Code, providing for his discharge, where he has been admitted to bail and

Criminal Law—concluded.

- not brought to trial before the end of the third term of court. *Whitner v. State* 144
39. An application for a discharge under sec. 391 of the Criminal Code should be overruled where it fails to show that three terms of court elapsed after the information against accused was filed, without his being brought to trial, and that the delay was not occasioned by want of time to try the case or upon his request. *Korth v. State* 631
40. In reviewing an order denying an application for a discharge under sec. 391 of the Criminal Code the presumption that the proceedings below were regular will prevail, where the contrary is not shown. *Id.*

Custom and Usage. See PRINCIPAL AND AGENT, 3, 4.

Damages. See ABSTRACTS OF TITLE, 2. DEATH BY WRONGFUL ACT. INTOXICATING LIQUORS. RAILROAD COMPANIES, 1, 2. REVIEW, 35. SET-OFF AND COUNTERCLAIM, 2.

1. Where property is destroyed by the negligence of a railroad company in setting out fire, the owner is entitled to interest on its value from the time of its destruction. *Union P. R. Co. v. Ray* 750
2. In a suit against a party for wrongfully terminating work under a contract, plaintiff's measure of damages is the profit he would have made by completing it. *Kreamer v. Irwin* 827
3. In an action for personal injuries it is error to submit to the jury the question as to whether the injuries were permanent, in absence of evidence tending to establish the permanency with reasonable certainty. *Chicago, R. I. & P. R. Co. v. Archer* 908
4. The submission of an element of damage not sustained by the evidence was treated as harmless error where it did not mislead the jury or affect the amount of the verdict. *Id.*

Dangerous Premises. See NEGLIGENCE.

Death by Wrongful Act. See NEGLIGENCE.

A petition in an action for death by wrongful act under ch. 21, Comp. Stats., is fatally defective, where it fails to show that plaintiff sustained pecuniary injury. *Orgall v. Chicago, B. & Q. R. Co.* 4

Deceit. See EVIDENCE, 3. FALSE REPRESENTATIONS.

Declarations. See HOMICIDE, 3-6.

Deeds. See MUNICIPAL CORPORATIONS, 1. RAILROAD COMPANIES, 1, 2.

1. Title passes to the grantee in a deed neither acknowledged nor recorded and afterward lost, and a sheriff's deed under a sale to satisfy a judgment against such grantee conveys the legal title. *Connell v. Galligher*..... 372
2. Description of land. *Hubermann v. Evans*..... 784

Deficiency Judgments. See MORTGAGES.

De Lunatico Inquirendo. See HOMICIDE, 13, 14.

Deposits. See BANKS AND BANKING, 4, 5.

Deputy Sheriffs. See SHERIFFS AND CONSTABLES, 7.

Description. See EXECUTIONS, 17.

- Sufficiency of description of realty in proceedings relating to guardians' sales. *Hubermann v. Evans*..... 784

Directing Verdict. See TRIAL, 7, 8.

Discrimination. See WATER COMPANIES, 4.

Dismissal. See REVIEW, 17, 41.

Distribution. See EXECUTORS AND ADMINISTRATORS, 1.
VOLUNTARY ASSIGNMENTS.

District Attorneys. See COUNTY ATTORNEYS.

District Irrigation. See IRRIGATION.

Easements. See RAILROAD COMPANIES, 1, 2.

Election of Remedies. See CRIMINAL LAW, 25.

- A creditor who knowingly ignores a voluntary assignment and elects to enforce his claim by attachment, cannot, after an adverse judgment, share in the distribution of the estate of the assignor, where he willfully refused to file his claim within the time allowed by law. *Commercial Nat. Bank of Omaha v. Lipp*..... 599

Elections.

Publication.

1. The validity of an election does not depend upon the publication of the election notice. *State v. Lansing*..... 515
2. Where a particular office is to be filled, an election for that office is not invalid because the filing thereof was not included in the published notice of election. *Id.*

Returns.

3. As a general rule canvassers of election returns are not clothed with either discretionary or quasi-judicial powers. *State v. McFadden*..... 668

Elections—concluded.

4. Election returns consist of the certificate of election officers, the list of those voting, and the tally list of the number of votes cast for the different persons. *Id.*..... 669
5. The abstract of the vote should be made from the entire election returns. *Id.*

Canvass.

6. Canvassers should disregard an unauthorized alteration made in the return after it has been delivered to the county clerk, and make the count according to the original and true return. *Id.*..... 668
7. Where there is a discrepancy between the certificate of the election board and the tally list as to the number of votes cast for a candidate, the canvassers should determine which is correct, after comparing them with the list of voters returned, and declare the result accordingly. *Id.*..... 669
State v. Eastman 675
8. Result of county seat election. *State v. Roper* 724, 730

Ballots.

9. Under sec. 145, ch. 26, Comp. Stats., the method of expressing the intention of the voter by a mark on the ballot opposite the name of the candidate of the voter's choice is exclusive. *Martin v. Miles* 772

Embezzlement.

1. The corporate character of the employer is an essential element of the offense, where employment by a corporation is charged in the information. *McAleer v. State* 116
2. In construing sec. 121, Criminal Code, the court held that the exception as to persons within the act relating to apprentices and those within the age of eighteen does not apply to officers, agents, attorneys, clerks, or servants of incorporated companies. *Id.*
3. Under an information charging embezzlement, proof of secreting money with intent to embezzle it is sufficient. *Id.*, 117
4. To constitute embezzlement under sec. 121, Criminal Code, it is essential that the money or thing embezzled should have come into the possession or care of defendant by virtue of his employment. *Id.*
5. A sheriff who converts to his own use money collected by virtue of his office is liable to a prosecution for embezzlement under sec. 121, Criminal Code. *Con'ey v. State* 187
6. In an information against a sheriff who sold land under foreclosure and converted to his own use, before the court made an order of distribution, the amount of the bid col-

Embezzlement—concluded.

lected, it is unnecessary to allege to whom the money belonged. *Id.*

7. Embezzlement is the fraudulent appropriation by an agent of the property of another. *Hamilton v. State*..... 285
8. The evidence will not sustain the conviction of an agent for embezzlement of his principal's property unless the facts warrant the conclusion that the property was converted with a felonious or fraudulent intent. *Id.*
9. Evidence that the relation of debtor and creditor existed between principal and agent, and that the latter was indebted to his employer when their account was balanced, is not alone sufficient to sustain a verdict finding the agent guilty of embezzlement. *Id.*..... 284
10. A number of different felonies of the same general character may be charged in separate counts of an information. *Korth v. State* 632
11. The act to provide for depositing state and county funds in banks (Session Laws, 1891, p. 347, ch. 50) did not repeal sec. 124, Criminal Code, making an officer liable for embezzlement where he loans county funds. *Id.*..... 633

Eminent Domain. See RAILROAD COMPANIES, 1, 2.

Equity. See ABATEMENT. ELECTION OF REMEDIES. JURY, 3.

Error Proceedings. See REVIEW.

Estoppel. See EVIDENCE, 2. PRINCIPAL AND AGENT, 3.

1. A party who signs in a trial court a stipulation providing that an interlocutory order may be reviewed on error, and that a judgment on the merits of the case may be entered in the error proceeding, is not thereby estopped from attacking the judgment of the appellate court for want of jurisdiction. *Johnson v. Parrotte* 52
2. A land-owner who states to an intending purchaser of a judgment that it is a lien on the former's land is, as against the latter, estopped from asserting the contrary. *Viergut v. Aultman*..... 141
3. A failure to examine the books of a corporation does not estop a creditor from attacking, as fraudulent, the valuation fixed upon property exchanged for corporate stock. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*..... 334
4. A party entitled to an estoppel need not in all cases formally plead it. *City Nat. Bank of Hastings v. Thomas*..... 861

Evidence. See ADVERSE POSSESSION. BANKS AND BANKING, 5, 6. BURGLARY, 5, 6. CHATTEL MORTGAGES, 5. CONTEMPT, 7, 8. CONTRACTS, 3. CRIMINAL LAW, 13, 17, 20, 33. EMBEZZLEMENT, 3, 8, 9. FALSE IMPRISONMENT, 2. FALSE REPRESENTATIONS, 2. HOMICIDE, 3-7, 13-18. LARCENY, 1. MECHANICS' LIENS, 1. NEGLIGENCE. NEGOTIABLE INSTRUMENTS, 5. NOTICE. PRINCIPAL AND AGENT, 2-5, 8. QUIETING TITLE. RAPE, 1-4. REVIEW, 15. ROBBERY, 1. WITNESSES.

Ratification.

1. Ratification by a corporation of an unauthorized act of an agent or officer may be proved by a direct recognition of the act or by an inference from facts and circumstances. *Reed v. First Nat. Bank of Weeping Water*..... 168

Documents.

2. A party who asks his adversary to offer in evidence a written instrument cannot urge in the appellate court that it should have been excluded as incompetent. *Smith v. Brown*..... 230

Parol Evidence.

3. A representation or promise by which a party was induced to sign a written order for the purchase of goods may be proved by parol. *Bryant v. Thesing*..... 245
4. In an action upon a written subscription parol evidence is not admissible to add conditions to those expressed in the contract. *Goble v. American Nat. Bank of Kansas City*... 891

Liquors.

5. Evidence as to intoxication and character of liquors purchased, in a suit on a saloon-keeper's bond. *Dolan v. McLaughlin*..... 449

Depositions.

6. A deposition may be used in the district court upon appeal from a justice where it was used below in the same case under a stipulation of the parties. *Keens v. Robertson*, 837

Hypothetical Questions.

7. In the trial of an action for personal injuries a hypothetical question containing inquiries relating to facts expressly assumed was held not prejudicial to defendant. *Chicago, R. I. & P. R. Co. v. Archer*..... 907
8. In the trial of an action for personal injuries a hypothetical question containing an inquiry as to the probable future duration of the injury was held a proper question to ask an expert. *Id.*

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 6.
REVIEW, 41.

Executions. See CREDITORS' BILL, 2. ESTOPPEL, 2.

1. Duties of an officer holding an execution for the sale of real estate. *Burkett v. Clark*..... 466
2. The terms "execution" and "order of sale" are used interchangeably in the statutes relating to judicial sales of real estate. *Id.*
3. An order of sale should contain, or have attached thereto, a copy of the decree. *Id.*..... 467
4. Sec. 490 of the Code is a legislative sanction and adoption of the writ of *venditioni exponas*. *Id.*..... 468
5. By sec. 504 of the Code the legislature made the writ of *venditioni exponas* applicable to sales of real estate. *Id.*
Levy.
6. To levy an execution is to do the acts by which an officer sets apart and appropriates, for the purpose of satisfying the writ, a part or the whole of a defendant's property. *Id.*, 467
7. An actual levy need not be made by an officer holding an execution by which he is commanded to sell land under a decree in equity. *Id.*
Appraisement.
8. The copy of appraisement and application for, and certificates of, liens mentioned in sec. 491d of the Code must be deposited in the office of the clerk who issued the writ, before the sale is advertised. *Id.*
9. Objections that the property is appraised too high, or too low, should be made and filed, with a motion to vacate the appraisement, before the sale. *Id.*
10. An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under an original or an *alias* writ. *Id.*..... 469
11. An officer has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale. *Id.*
Return.
12. The life of an execution from a court of record is limited by sec. 510 of the Code to sixty days from its date, and must be returned within that time, whether it be the original or an *alias* writ. *Id.*..... 468
Mortgaged Chattels.
13. A mortgagor's interest in chattels may be levied upon and sold under execution. *Gould v. Armagost*..... 897

Executions—concluded.

14. A purchaser of mortgaged chattels at an execution sale takes the property subject to all valid liens and rights of lienors at the time of the levy. *Id.*

Confirmation of Sales.

15. A district judge at chambers may, upon proper notice, confirm a judicial sale. *Beatrice Paper Co. v. Beloit Iron Works*..... 900

Recall.

16. For a sufficient reason a district court may recall an execution or order of sale and set aside an appraisal of property made thereunder. *Id.*
17. An omission in an execution or order of sale to describe all the property covered by the decree is a sufficient reason for recalling the writ and setting aside the appraisal. *Id.*..... 901

Executors and Administrators. See WILLS.

1. An executor, as such, cannot appeal from a county court's final order of distribution where he is not pecuniarily affected by the order. *Merrick v. Kennedy*..... 264
2. An executor may appeal from a county court's adverse decision upon his petition to correct a mistake in the settlement of his former account. *Id.*
3. A county court may order distribution of personalty in the hands of an executor after payment of debts and charges of administration, though a suit, in which the executor has no interest, brought against him by a devisee for the construction of a devise of realty, is pending in the district court. *Id.*

Expert Witnesses. See EVIDENCE, 7, 8.**Factors and Brokers. See BANKS AND BANKING, 7.
REAL ESTATE AGENTS.****False Imprisonment.**

1. In a suit for false imprisonment, evidence to establish the previous good character of plaintiff is inadmissible where his character has not been assailed. *Diers v. Mallon*..... 122
2. The reasonableness of the prisoner's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the prisoner was held. *Id.*
3. Where the facts are in dispute, it is for the jury to determine the question as to the reasonableness of the detention. *Id.*

False Imprisonment—concluded.

4. The question as to whether the officer had reasonable ground to believe the person arrested had committed a felony is for the jury under proper instructions, where the evidence is conflicting. *Id.*
5. Where the facts are conceded or undisputed, probable cause is a question of law for the court to determine. *Id.*
6. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing the accused guilty. *Id.*
7. Evidence held sufficient to justify a verdict for defendants. *Id.*

False Representations.

1. In an action for false representations it is not necessary to aver or prove that the party making them at the time knew they were untrue. *Johnson v. Gulick*..... 817
2. Under an allegation by defendant that the note sued on was procured by false representations, evidence that plaintiff previously made false statements to others in similar transactions is inadmissible. *Id.*..... 818

Fees. See SHERIFFS AND CONSTABLES, 7.

The legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation. *State v. Vincent* 408

Final Order. See JUDGMENTS, 4-7.**Forgery.**

1. An information charging the forgery of an instrument and the fraudulent uttering of the same instrument by the same person charges one crime, and in case of conviction but one penalty can be inflicted. *Griffen v. State* 283
2. It is sufficient in an information for forgery to charge in general terms the intent to defraud. *Morearty v. State*.... 632
3. In a prosecution for forgery it is not necessary to state or prove an intent to defraud any particular person. *Id.*
4. An order to deliver to bearer a specific article of personal property may be the subject of forgery. *Id.*
5. Sufficiency of information without an averment as to extrinsic matter, where the subject of forgery is an order to deliver to bearer a specific article of personal property. *Id.*

Former Jeopardy. See CRIMINAL LAW, 9.

Fraud. See ABSTRACTS OF TITLE, 2. MANDAMUS, 11. REAL ESTATE AGENTS..

Fraudulent Conveyances. See ATTACHMENT, 1. CHATTEL MORTGAGES, 4, 5. CORPORATIONS, 7.

1. The failure of a purchaser of chattels to take possession does not render the sale conclusively void as against creditors, but casts upon him the burden of proving good faith. *Powell v. Yeazel*..... 225
2. In a contest between a purchaser of chattels and creditors of one under whom he claims title it is error to give instructions in which the sale is characterized as a "pretended sale," where the evidence tends to show a purchase in good faith for value. *Id.*
3. A finding for plaintiff in an action to cancel certain alleged fraudulent conveyances was held to be sustained by the evidence. *Monroe v. Reid*..... 317

Guardian and Ward.

1. By "a district court of competent jurisdiction," referred to in sec. 64, ch. 23, Comp. Stats., is meant the district court of the county in which the guardian was appointed. *Hubermann v. Evans* 784
2. A guardian's petition for a license to sell realty of the ward should describe all the land he owns, and especially the portion for sale; but a description which provides the means of identifying the property will be held sufficient when collaterally attacked. *Id.*
3. A general description of the premises in a petition to sell a ward's property, as all the real estate of the ward situate in this state, or in any particular county or city therein, is not void for indefiniteness or uncertainty. *Id.*... 785-
4. In proceedings to sell a ward's land the description need not be more specific, definite, and certain than that required in a conveyance of realty. *Id.*
5. The proceedings for authority for a guardian's sale will not be invalidated by reason of a manifestly false statement in the description of the land in the application and license, where the remainder of the description is sufficiently certain to enable the land to be located. *Id.*
6. Where a guardian's sale complies with all the requirements essential to its validity under sec. 64, ch. 23, Comp. Stats., defects and irregularities in the proceedings will not affect the title of a good-faith purchaser. *Id.*..... 784

Guardians' Sales. See GUARDIAN AND WARD.

Harmless Error. See DAMAGES, 4. REVIEW, 50.

Homestead. See ESTOPPEL, 2.

Homicide. See STATUTES, 15.

1. The jury cannot fix the penalty where the murder was committed before ch. 44, Session Laws, 1895, went into effect. *Walker v. State*..... 25
2. Propriety of certain instructions stating the law as to a reasonable doubt. *Collins v. State*..... 38

Dying Declarations.

3. Under the circumstances stated in the opinion, a declaration by one fatally injured, that he had been accidentally shot by a person named, was *held* inadmissible, as neither a dying declaration nor part of the *res gestæ*. *Id.*
4. Whether the declaration of a person fatally injured is competent evidence, as being part of the *res gestæ*, must be determined from the facts and circumstances surrounding the case. *Id.*
5. To make dying declarations admissible, a statement by the injured person that he expects to die is unnecessary, where that state of the mind is shown by other testimony. *Id.*..... 37
6. The declaration of a fatally injured person as to the cause of the injury, though not made in presence of the assailant and inadmissible as a dying declaration, may be competent evidence as part of the *res gestæ*, where it was made under such circumstances as to raise the presumption that it was an unpremeditated explanation. *Id.*..... 38

Confessions.

7. Statements in the nature of confessions by the accused *held* voluntary and properly admitted in evidence. *Pfurger v. State*..... 493

Trial. Misconduct of Bystander.

8. In a trial for murder the mother of deceased exclaimed, in presence and hearing of the jury, that accused killed her son, and the record was *held* to be without reversible error where it showed that the prosecution was not responsible for her conduct; that the court, with consent of the county attorney, promptly removed her from the court room; and that she did not return. *Lindsay v. State*..... 177

Murder in Second Degree.

9. Sufficiency of evidence to sustain a conviction for murder in the second degree. *Collins v. State*..... 51

Homicide—concluded.

Manslaughter.

10. Where a felon can be arrested or his escape prevented without killing him, and he is slain by a sheriff, the latter is at least guilty of manslaughter. *Lamma v. State*..... 236
11. Evidence held sufficient to sustain a conviction of manslaughter. *Id.*

Insanity.

12. Where insanity did not originate after the commission of the offense, there is no requirement that its existence should be determined by a jury impaneled to determine whether or not the accused is of sound mind. *Walker v. State*..... 25
13. Insanity of accused at the time he committed the homicide will not be conclusively presumed from a previous order of the commissioners of insanity finding that he is a fit subject for treatment in an insane asylum. *Pflueger v. State*..... 493
14. Where insanity is the ground of defense in a prosecution for murder, a previous order of the commissioners of insanity finding that accused is a fit subject for treatment in an insane asylum, is, at most, evidence of the defense. *Id.*
15. Instructions defining insanity as a defense in a prosecution for murder examined and approved. *Id.*
16. The opinions of non-expert witnesses who knew accused for fifteen years and observed him almost daily for six weeks before he committed the homicide may be admitted as evidence upon the question of his sanity. *Id.*
17. In a prosecution for murder a non-expert witness, where the proper foundation has been laid, may state his opinion as to the sanity of accused and as to whether the latter was able to distinguish between right and wrong with respect to the crime charged. *Id.*
18. In a trial for murder, the defense being insanity, the court must impartially recite the material evidence offered by both parties, where it undertakes to detail in an instruction what evidence the jury may consider in determining whether accused knew the killing was wrong. *Williams v. State*..... 704

Husband and Wife.

1. Except in a suit for a divorce and in a proceeding for a crime committed by a husband against a wife, the latter cannot testify against the former. *Bohner v. Bohner*..... 204
2. Right of wife to sue her husband for slander is not decided. *Id.*..... 205

Husband and Wife—concluded.

3. Liability of wife who signed a note as surety for her husband. *McKinney v. Hopwood*..... 871
4. Evidence in an action against a married woman upon a note executed by her as surety for her husband held sufficient to sustain a verdict against her. *Spätz v. Martin*... 917

Imprisonment. See CRIMINAL LAW, 8.**Indictment and Information.** See ARSON. CONTEMPT, 13. CRIMINAL LAW, 19, 26, 28. EMBEZZLEMENT, 6. FORGERY. ROBBERY.

1. Sufficiency of information for contempt for violating a temporary injunction. *O'Chander v. State*..... 10
2. Formal defect in an information will be deemed waived unless objected to before trial. *Zimmerman v. State*..... 14
3. Sufficiency of information set out in the opinion to charge defendant with practicing medicine without a license. *O'Connor v. State*..... 158
4. In an information it is necessary to state specifically the essential facts constituting the crime charged. *Id.*
5. Different criminal acts constituting parts of the same transaction, such as burglary with intent to steal particular property, and the stealing of such property, may be charged in the same indictment or count thereof. *Lawhead v. State*.... 607
6. A number of different felonies of the same general character may be charged in separate counts of an information, and it is within the discretion of the court to require the state to elect as to counts. *Korth v. State*..... 632
7. It is within the discretion of the trial court to permit the county attorney to indorse the names of additional witnesses on the information after the filing thereof and before trial. *Rauschkolb v. State*..... 658

Information. See INDICTMENT AND INFORMATION.**Injunction.**

1. Where a bond for an appeal from an order dissolving an injunction omits a material, statutory condition, it does not operate as a supersedeas. *O'Chander v. State*..... 10
2. Where a bond for an appeal from an order dissolving an injunction does not on account of defects operate as a supersedeas, a party is not punishable for contempt for violating the injunction after it was dissolved. *Id.*
3. A judge of the district court who granted an injunction has jurisdiction, under sec. 260 of the Code, upon proper

Injunction—concluded.

information, to try and to sentence for contempt one who violated the injunction. *Zimmerman v. State*..... 14

4. Where one conveys a strip of land to a city for a street around a park upon condition that the grantee shall, at its own expense, improve the street and forever keep it in repair, injunction will lie to restrain a sale of the abutting property under an assessment for improving the street. *City of Omaha v. Megeath*..... 502

5. An order dissolving or modifying a temporary injunction is not reviewable until the final judgment has been entered in the case. *Bartram v. Sherman*..... 713

Insanity. See HOMICIDE, 12-18. WITNESSES, 4.

Insolvency. See PARTNERSHIP, 1.

Institution for Blind. See OFFICE AND OFFICERS, 2.

Instructions. See ATTORNEY AND CLIENT. DAMAGES, 3. HOMICIDE, 15. INTOXICATING LIQUORS. LARCENY, 2, 4, 8, 9. RAPE, 6. REVIEW, 18, 19.

Civil Cases. Practice.

1. Where the assignments of the motion for a new trial and petition in error are insufficient to challenge the correctness of the instructions, the charge of the court will not be considered on review. *Diers v. Mallon* 122
2. Discussion of instructions relating to measurement of hay sold by the cubic foot. *Smith v. Brown* 230
3. Where plaintiff fails to recover on his cause of action, his objections to instructions relating to the measure of damages will not be considered in the supreme court. *Olsen v. Meyer* 241
4. Instructions as to rights of defendant in a suit for the price of nursery stock where part of the stock tendered was not the kind ordered. *Bryant v. Thesing* 249

Original Instructions.

5. Case where the appellate court ordered the clerk of the district court to send up the original instructions. *Shafer v. Briggs* 446

Exceptions.

6. A general exception to the charge to a jury is unavailing unless the entire charge is erroneous. *Redman v. Voss*..... 512

Negligence.

7. Discussion of instructions in an action against a railway company for negligently setting out fire. *Union P. R. Co. v. Ray* 750

Instructions—continued.

Objections.

8. An objection that the court erred in giving or refusing instructions cannot be raised for the first time in the appellate court. *Keens v. Robertson*..... 837

Prejudice.

9. Where there is evidence tending to establish the *bona fides* of a conveyance, the validity of which is in issue, it is error to give instructions characterizing the transaction as a "pretended sale." *Powell v. Yeazel* 225

Application.

10. It is not reversible error to refuse to give an instruction not applicable to the evidence. *Brumback v. German Nat. Bank of Beatrice*..... 540

Assignments of Error.

11. An assignment that a group of instructions is erroneous will not be considered further than to ascertain that one of them was properly given. *Diers v. Mallon*..... 132
Kaufmann v. Cooper 644
McCormac v. Redden 777
12. On review an assignment of error as to refusing a group of instructions will be considered no further than to ascertain that one of them was properly refused. *Kaufmann v. Cooper*..... 644

Repetitions.

13. The court may refuse to give an instruction as to points already submitted. *Brumback v. German Nat. Bank of Beatrice*..... 543
14. The repetition of a proposition is not reversible error, unless it appears that the defeated party was prejudiced. *City Nat. Bank of Hastings v. Thomas*..... 861

Criminal Law. Repetitions.

15. In a criminal case the repetition of a proposition is not reversible error where it does not prejudice the rights of the accused. *Dixon v. State*..... 299
16. In criminal cases instructions requested by defendant may be refused where the propositions contained therein have already been given in proper language. *Ford v. State*..... 391
Lawhead v. State..... 608
Korth v. State..... 633
17. The giving of an erroneous instruction is reversible error, though a correct exposition of the law on the same subject has been given. *Metz v. State*..... 548

Construction.

18. Instructions should be construed together. *Ford v. State*, 391

Instructions—continued.

19. Where instructions, considered as a whole, properly state the law, they are sufficient. *Id.*

Reasonable Doubt.

20. Instruction relating to reasonable doubt. *Collins v. State*, 38
Lawhead v. State..... 607

Intoxication.

21. Instruction relating to defense of intoxication held correct. *Ford v. State*..... 391

Insanity.

22. Where the defense is insanity in a trial for murder, it is error for the court to group together in an instruction the important facts put in evidence by the state as to sanity of accused and omit all mention of that produced on behalf of the latter. *Williams v. State*..... 704

Requests.

23. In a criminal case the county attorney has the same right as counsel in a civil suit to request instructions. *Dixon v. State*..... 299
24. Instructions given at the request of counsel are entitled to the same weight as those given by the court of its own motion. *Id.*

Evidence.

25. An instruction by which it is sought to cover the whole case should include all the elements necessarily involved within the evidence. *McAleer v. State*..... 116

Language.

26. In a criminal case defendant cannot complain if the court charges the jury in the language of the information that all the allegations thereof are material, no technical or ambiguous language being used. *Dixon v. State* 299

Erasures.

27. It is error to modify by erasure or interlineation an instruction requested and give it to the jury as thus corrected. *Tracey v. State*..... 362

Burden of Proof.

28. An instruction in a criminal case is erroneous where it has the effect to shift the burden of proof from the state to the accused. *Haskins v. State* 888

Assumptions of Fact.

29. It is error to give an instruction which assumes a controverted material fact upon which the testimony is conflicting. *Metz v. State* 548
30. It is reversible error to give an instruction assuming the

Instructions—concluded.

- existence of material facts which are unsupported by evidence. *Morearty v. State*..... 652
Williams v. State 704
31. It is an unwarranted assumption of the functions of the jury to instruct that the evidence establishes a controverted fact in issue. *Williams v. State* 704
32. It is error to give an instruction infringing on the province of the jury. *Haskins v. State*..... 888

Insurance.

1. A clause in a policy providing that the insurance shall be suspended during the non-payment of a premium note after maturity may be waived by the insurer. *McEvoy v. Nebraska & Iowa Ins. Co.*..... 782
2. The company may recover the full amount of a premium note upon default in payment thereof, though the note and policy contain a provision that the insurance shall be suspended during the non-payment of the note after maturity. *Id.*

Interest.

1. Where property is destroyed by the negligence of another, the owner is entitled to interest on its value from the time of its destruction. *Union P. R. Co. v. Ray*..... 750
2. In computing interest, the rate fixed by the contract should govern, where it provides for six per cent per annum until maturity and ten per cent thereafter. *Omaha Loan & Trust Co. v. Hanson*..... 870

Intoxicating Liquors. See **CONTRACTS**, 8.

1. Discussion of instructions relating to the liability of several saloon-keepers in an action on their bonds by a widow and her children for loss of support, where it was alleged that the death of the head of the family resulted from intoxication produced by the use of liquors purchased at different saloons. *Dolan v. McLaughlin*..... 449
2. In an action on a saloon-keeper's bond an instruction stating that liquor sold at a saloon is presumed to be intoxicating was held erroneous where it was shown that part of the liquor furnished was not intoxicating. *Id.*..... 450

Intoxication. See **LARCENY**, 4.**Irrigation.**

1. Irrigation districts are public, rather than municipal, corporations, and their officers are public agents of the state. *Board of Directors of Alfalfa Irrigation District v. Collins*... 411

Irrigation—concluded.

2. The district irrigation law (Session Laws, 1895, p. 269, ch. 70) is not unconstitutional on the ground that it authorizes the taking of property for private use; nor on the ground that the power conferred upon districts to levy taxes is without limitation; nor on the ground that it confers legislative power upon county boards. *Id.*

Jeopardy. See CRIMINAL LAW, 9.

Judges. See CONSTITUTIONAL LAW, 14. CONTEMPT, 7.

Judgments. See COUNTY COURTS. CRIMINAL LAW, 1, 3, 4, 8. ESTOPPEL, 2. EXECUTIONS, 3. MORTGAGES. PLEADING, 1. RES ADJUDICATA.

1. A judgment on the merits of a case is void where it was rendered by the supreme court in a proceeding in error from an order not final. *Johnson v. Parrotte*..... 52
2. A void judgment may be impeached in a direct or collateral action. *Id.*..... 53
3. A judgment cannot be attacked collaterally for irregularities where the court had jurisdiction. *Hough v. Stover*..... 588
4. An order setting aside a verdict and granting a new trial during the term at which the verdict was rendered, and before judgment, is not a final order. *Johnson v. Parrotte*, 52
5. An order continuing in force during the pleasure of the court a temporary injunction is not a final order. *Einsphur v. Smith*..... 138
6. An order dissolving or modifying a temporary injunction is not a final order. *Bartram v. Sherman* 713
7. An order quashing a summons is not a final order. *Lewis v. Barker*..... 662
8. In an action for the price of beer, the admission of defendant that he obtained the goods and owes the sum claimed, and a verdict accordingly, do not amount to a confession of judgment, where there has been no ruling or finding upon his counter-claim for payment for a liquor license which plaintiff agreed to furnish. *Storz v. Finklestein*..... 577
9. In setting aside a money judgment the court cannot preserve the lien so as to make it attach to a subsequent judgment in the same case. *Farmers Loan & Trust Co. v. Killinger* 677
Baker v. Killinger..... 682

Judicial Comity. See STARE DECISIS.

Judicial Sales. See EXECUTIONS. GUARDIAN AND WARD.

Jurisdiction. See ATTACHMENT, 4. CONTEMPT, 2. COUNTIES, 3, 4, 10, 11. REPLEVIN, 2. REVIEW, 10, 11.

Where the trial court is without jurisdiction it cannot be acquired in the appellate court by appeal. *Keeshan v. State*... 155

Jury. See CRIMINAL LAW, 31, 33.

1. Error cannot be predicated upon the overruling of a challenge for cause where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Brumback v. German Nat. Bank of Beatrice*..... 540
2. Case where the voir dire examination showed the qualification of a juror, and he was permitted to serve, though he previously stated, through a desire to be excused, that he would send the defendant up for life. *Conley v. State*... 193
3. An action to set aside a fraudulent transfer of property and subject it to the payment of a judgment against the transferor is equitable in its nature and may be tried to the court without a jury. *Monroe v. Reid*..... 316
4. It is not error for the trial court in a prosecution for a felony to order the sheriff to summon persons qualified to serve as jurors in anticipation of a demand for talesmen. *Pflueger v. State*..... 493

Justice of the Peace. See REPLEVIN, 2.

1. The only authority of a justice of the peace under sec. 17, Criminal Code, previous to the amendment thereof in 1893, was that of an examining magistrate. *Keeshan v. State*... 155
2. The jurisdiction of a justice of the peace extends only to offenses for which the penalty does not exceed three months' imprisonment or a fine not exceeding one hundred dollars. (Constitution, sec. 18, art. 6.) *Id.*

Laborers' Liens. See MECHANICS' LIENS.

Landlord and Tenant.

1. Generally, the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties. *Sleen v. Scheel*..... 252
2. Construction of a lease providing that the tenant should hold the property two years with the refusal of leasing it two years more on the same terms, and sufficiency of evidence to show that the relation of landlord and tenant terminated in two years from date of the contract. *Id.*
3. A promise by a landlord to pay for moving the goods of the tenant upon condition of the latter's yielding possession of the premises is not without consideration where the tenant performs his part of the contract. *Creighton v. Finlayson*..... 457

Larceny.

1. The effect to be given to the fact of defendant's possession, recently after the larceny, of the stolen property is a question for the jury to determine. *Dobson v. State*..... 250
2. In a prosecution for larceny as bailee an instruction which fails to charge that the original taking of the property must be felonious is not for that reason erroneous. *Ford v. State*..... 390
3. In a prosecution for larceny as bailee the gist of the offense is the conversion of the property without the knowledge and consent of the owner, with intent to steal it. *Id.*
4. Approval of instruction stating the rule relating to the defense of intoxication in a prosecution for larceny as bailee. *Id.*..... 391
5. Evidence held sufficient to sustain a conviction of larceny as bailee. *Id.*
6. Evidence held sufficient to sustain a conviction. *Lawhead v. State*..... 608
7. Instruction relating to reasonable doubt held not erroneous. *Id.*
8. Where the jury has been instructed as to the distinction between grand and petit larceny, it is not error for the court to add that the jury has nothing to do with the question of the penalty. *Id.*
9. An instruction is erroneous where it infringes the province of the jury or has the effect to shift the burden of proof from the state to the accused. *Haskins v. State* 888

Lease. See LANDLORD AND TENANT. PENITENTIARY, 2.

Legislature. See OFFICE AND OFFICERS, 2.

Levy. See EXECUTIONS.

Libel and Slander.

Verbal slander is not a crime punishable in a prosecution by the state. *Bohner v. Bohner*..... 205

License. See GUARDIAN AND WARD, 2.

Liens. See ESTOPPEL, 2. JUDGMENTS.

Limitation of Actions. See MECHANICS' LIENS, 1. VOLUNTARY ASSIGNMENTS.

A suit against a national bank to recover the penalty, under sec. 5198, Rev. Stats., U. S., for taking usury must be brought in two years from the date of the usurious transaction. *Norfolk Nat. Bank v. Schwenk*..... 381

Malicious Prosecution.

- As a rule, an action for malicious prosecution will not lie until the proceeding complained of has terminated in favor of the defendant therein. *Murphy v. Ernst*..... 1

Mandamus.*Validity of Statute.*

1. The performance of a duty imposed by statute may be resisted upon application for *mandamus* on the ground that the statute is unconstitutional. *Van Horn v. State* 62

Parties.

2. Members of a board may join as relators in *mandamus* against the board. *Cooperrider v. State*..... 84
3. In *mandamus* against a board, where all the members are either relators or respondents, there is no defect of parties. *Id.*
4. In *mandamus* it is proper to name as respondent, and direct the writ against, the individual holding the office, in his official capacity. *Id.*

Supersedeas.

5. Where a peremptory writ has been awarded, allowance of a supersedeas rests within the discretion of the trial court. *Id.*

Water Companies.

6. *Mandamus* may issue to compel a water company to supply water to a customer who paid his rent, though he is insolvent and refuses to comply with a rule of the company requiring those in default to pay one dollar in addition to the rent. *American Water-Works Co. v. State*..... 195

State Auditor.

7. The writ may issue to compel the auditor of public accounts to register county bonds, where he bases his refusal upon an immaterial defect relating to antedates. *State v. Moore*, 590

Board of Purchase and Supplies.

8. *Mandamus* may be maintained on relation of the warden to require the board of purchase and supplies to provide the necessities for the support of the state penitentiary. *State v. Holcomb*..... 612

Canvassing Boards.

9. *Mandamus* will lie to compel a canvassing board to reconvene and make a correct canvass of the election returns, where it adjourned without fully performing its duty. *State v. McFadden*..... 669

Relocation of County Seat.

10. An application for a *mandamus* to compel county officers to

Mandamus—concluded.

remove their offices from Indianola to McCook was held insufficient to state a cause of action where it failed to show that three-fifths of all the electors of the county voted to relocate the county seat. *State v. Roper*..... 724

11. On application for *mandamus* to compel the removal of a county seat pursuant to the declared result of a canvass of the vote on the question of relocation the court cannot go behind the returns. *Id.*..... 730

Elections.

12. A *prima facie* right established by a canvass of the vote at an election may be enforced by *mandamus*, but the court will not determine the ultimate right in such a proceeding. *Id.*

Power to Obey.

13. A writ should not issue where it is not within the power of respondents to perform the act sought to be enforced, or where the writ would otherwise be unavailing. *Farris v. State* 857

Manslaughter. See HOMICIDE, 10, 11.

Married Women. See HUSBAND AND WIFE, 4.

Master and Servant.

1. A person who contracted to perform labor or services for another is presumed to have done so in view of the risks ordinarily incident to the employment. *Dehning v. Detroit Bridge & Iron Works*..... 556
2. A servant who incurs the risk of appliances which, though dangerous, he may safely use by the exercise of reasonable skill and caution, does not, as a matter of law, assume the risk of injury from an accident resulting from the master's negligence. *Id.*

Maxims.

Where one of two innocent persons must suffer, it should be that one who misled the other into the contract. *Johnston v. Milwaukee & Wyoming Investment Co.*..... 490
City Nat. Bank of Hastings v. Thomas..... 867

Mechanics' Liens.

1. Where more than sixty days intervened between two dates when labor was performed for a contractor, the presumption is that it was performed under separate contracts; and the laborer, to secure a lien under the first contract, must file his statement within sixty days from the last day he labored under it. *Hansen v. Kinney* 208

Mechanics' Liens—concluded.

2. A laborer for a contractor should not be allowed to tack one contract to another and procure a lien for all the labor performed under both by filing his statement within sixty days from the last day he labored under the second contract. *Id.*
3. The contract for labor and material under which a subcontractor claimed a lien held not such a contract as is contemplated by sec. 3, ch. 54, Comp. Stats. *Specht v. Stevens*, 874

Misconduct of Attorney. See CRIMINAL LAW, 35, 36.

Mistake. See CHATTEL MORTGAGES, 3. RECORDS.

Money Had and Received. See ATTORNEY AND CLIENT, 2.

Month. See CONSTITUTIONAL LAW, 9, 10.

Mortgages. See ABSTRACTS OF TITLE, 2. EMBEZZLEMENT, 6.

Where land was deeded to one of several purchasers, and the former alone executed a mortgage and signed as trustee purchase-money notes, though he did not disclose the nature of the trust, a deficiency judgment may, upon foreclosure, be entered against the trustee but not against the other purchasers. *Farrell v. Reed*..... 258

Municipal Bonds. See MUNICIPAL CORPORATIONS, 2.

Municipal Corporations. See CORPORATIONS, 10. WATER COMPANIES.

1. Where one conveys a strip of land to a city for a street around a park upon the condition that the grantee shall, at its own expense, improve the street and forever keep it in repair, the abutting property of the grantor, or of subsequent purchasers, cannot be assessed for improvements of the street. *City of Omaha v. Megeath* 502
2. The validity of municipal bonds is not affected by an apparent irregularity which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters. *State v. Moore*..... 590

Murder. See HOMICIDE. STATUTES, 15.

National Banks. See LIMITATION OF ACTIONS.

Negligence. See MASTER AND SERVANT, 2. RAILROAD COMPANIES, 4, 5.

In a suit for negligently permitting a wall to remain unsupported, evidence by defendant may be admitted to show that during more than two years after it fell there was no storm equal in severity to that which caused the fall resulting in the death of plaintiff's intestate. *Olsen v. Meyer*, 240

Negotiable Instruments. See FALSE REPRESENTATIONS,
2. HUSBAND AND WIFE, 4. INSURANCE. USURY.

1. It was *held* that a surety on a note signed a renewal note in such a manner as to limit his liability and prevent a co-surety who signed both notes from enforcing contribution after payment of the renewal note. *Chapman v. Garber* 16
2. A note signed by one who adds "trustee" to his name without disclosing the nature of the trust is the personal obligation of the signer and not that of the *cestui que trust*. *Farrell v. Reed* 258
3. Verdict for plaintiff *held* to be sustained by the evidence in a suit on a note, where the sureties alleged that the principal delivered it without complying with an agreement to procure the signature of another surety. *Brumback v. German Nat. Bank of Beatrice*. 540
4. An unkept agreement between a maker and several sureties, that their note shall not be delivered until signed by another surety, is no defense in a suit on the note, where the payee had no knowledge of the agreement. *Id.*
5. Where a note executed by a deviser was canceled after his death and a new one given by the devisees, a will showing that the devise was subject to the payment of debts and that the property was bequeathed to them, may, in an action on the note, be admitted in evidence under an issue as to consideration. *McCormal v. Redden*. 776
6. Where one made a devise subject to his debts and signed a note which remained unpaid at the time of his death, the cancellation of the note and an extension of time to pay the sum due thereon are sufficient as a consideration for a note for that amount executed by the devisees. *Id.*
7. Possession of instruments negotiable by delivery is *prima facie* evidence of ownership. *City Nat. Bank of Hastings v. Thomas*. 862
8. One purchasing negotiable paper at a bank from its president, payment being guaranteed by him, is justified in relying on his representation that the paper belonged to the bank, and the latter is bound by such representation. *Id.*

New Trial. See CONTEMPT, 4. CRIMINAL LAW, 33. REVIEW, 36-41.

1. An objection that the verdict is for a sum greater than that prayed for should be raised by motion for a new trial. *Fox v. Graves* 813
2. It is too late to raise for the first time in a motion for a

New Trial—*concluded.*

new trial an objection that a litigant was forced to trial in absence of his witnesses. *Kreamer v. Irwin*..... 827

3. The granting of a new trial is largely within the discretion of the trial court. *School District v. Bishop*..... 850

Nonsuit. See PRACTICE, 2.**Notice.** See NEGOTIABLE INSTRUMENTS, 4.

1. Before granting credit to a corporation, strangers are not chargeable with notice of the contents of the former's books. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*..... 334
2. Where a decree in equity has been entered, and the case remains on the docket pending proceedings to sell property, the parties, in the absence of a rule on the subject, are bound to take notice of all the orders entered in term time, which do not affect the original decree. *Beatrice Paper Co. v. Beloit Iron Works* 901

Oath of Office. See OFFICE AND OFFICERS, 5.**Objections.** See CRIMINAL LAW, 12, 18. EXECUTIONS, 9. REVIEW, 4, 39. TRIAL, 5, 10, 12.**Office and Officers.** See COUNTY ATTORNEYS. ELECTIONS. EMBEZZLEMENT, 11. MANDAMUS. PENITENTIARY. SHERIFFS AND CONSTABLES. TOWNSHIPS, 5.

1. Where the law prescribes the duties of a public officer and fixes his compensation, he must perform all the duties required by law for such compensation. *Heald v. Polk County* 28
Ragoss v. Cuming County..... 36
2. Sec. 2, p. 149, Session Laws, 1875, providing for the election by the legislature of trustees for the institution for the blind, is repugnant to sec. 10, art. 5, of the constitution, and was thereby repealed. *State v. Holcomb*..... 88
3. The right to fees or salary earned by a public officer under existing laws is property which the legislature is powerless to destroy by a subsequent act altering the emoluments of such office. *State v. Vincent*..... 408
4. District irrigation officers are public agents of the state. *Board of Directors of Alfalfa Irrigation District v. Collins*... 411
5. Secs. 7, 15, 17, ch. 10, Comp. Stats., require one who has been re-elected or re-appointed to an office to qualify by taking the oath and filing the bond in the same manner and within the same time as one for the first time elected. *State v. Lansing*..... 514
6. Sec. 15, ch. 10, Comp. Stats., providing that if any person

Office and Officers—concluded.

- elected or appointed to an office shall neglect to have his bond executed, approved, and filed within the time limited by the act, his office shall become vacant, creates a condition precedent to the right of a person so elected or appointed to be inducted into office. *Id.*
7. Sec. 15, ch. 10, Comp. Stats., relating to official bonds, is self-executing, and unless a bond is filed within the time provided by law, the person elected loses all right to the office, and the vacancy may be filled without any previous judicial determination of the fact. *Id.*
8. A distinction exists between the ousting from office of one already inducted and the exclusion of one not yet inducted because of his failure to perform a condition precedent. *State v. Lansing*..... 515
9. Sec. 20, art. 3, of the constitution stating certain conditions under which offices become vacant does not prohibit the legislature from providing that vacancies in office may arise from other events. *Id.*
10. Officers may, without statutory authority, insert in a contract for erecting a public building and in the builder's bond a provision to secure payment of the claims of laborers and material-men. *Kaufmann v. Cooper*..... 644

Opinion Evidence. See HOMICIDE, 16, 17.

Orders of Sale. See EXECUTIONS.

Overdrafts. See BANKS AND BANKING, 4, 5.

Overruled Cases. See TABLE, *ante*, p. lvii.

Parol Evidence. See EVIDENCE, 3.

Parties. See MANDAMUS, 2-4. PLEADING, 10. REVIEW, 51.

Partnership. See CORPORATIONS, 1. PRINCIPAL AND SURETY, 3. REPLEVIN, 4.

1. On dissolution of an insolvent partnership, its assets will be treated as a trust fund for payment of partnership debts, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors. *Perkins v. Butler County*..... 314
2. A partner cannot, without the consent of his copartners, apply firm property in satisfaction of his individual liabilities. *Cady v. South Omaha Nat. Bank*..... 763

Payment. See CORPORATIONS, 4-6.

Penalty. See LARCENY, 8.

Penitentiary.

1. In absence of statutory restriction it is within the power of the board of public lands and buildings to appoint an agent to lease or manage the convict labor and the shops and machinery within the penitentiary. *State v. Holcomb*, 614
2. The board of public lands and buildings may lease the convict labor, penitentiary grounds, shops, and machinery. *Id.*
3. It is within the power of the board of public lands and buildings to provide by contract for the feeding and clothing of convicts in the penitentiary as one of the considerations for the leasing of their labor. *Id.*
4. One who leases the convict labor and penitentiary grounds cannot, even with the assent of the board of public lands and buildings, usurp any of the functions of the warden as the keeper of the prison. *Id.*
5. The power conferred upon the board of public lands and buildings by sec. 17, Session Laws, 1877, p. 194, to lease the convict labor of the state for a period not exceeding ten years is not a continuing power, but was exhausted by a single user. *Id.*..... 613
6. The warden of the state penitentiary is the keeper of the prison, subject to the management and control of the board of public lands and buildings. *Id.*
7. Except when furnished by the contractor pursuant to an agreement with the state, the statutory method for procuring supplies for the penitentiary is exclusive, and the board of public lands and buildings cannot delegate to an agent of its own selection the disbursement of money appropriated for that purpose. *Id.*..... 614

Personal Injuries. See DAMAGES, 3.

Petition in Error. See REVIEW, 10.

Physicians and Surgeons.

1. Definition of practicing medicine. *O'Connor v. State*..... 158
2. It is unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, without first having obtained and registered a certificate from the state board of health. *Id.*..... 157
3. Sufficiency of information charging a person with practicing medicine without first having obtained and registered a certificate from the state board of health. *Id.*..... 158

Plea in Abatement. See CRIMINAL LAW, 19.

Pleading. See ACCORD AND SATISFACTION. BANKS AND BANKING, 6. CONTRACTS, 2. CORPORATIONS, 8, 12. CREDITORS' BILL, 1. CRIMINAL LAW, 10. GUARDIAN AND WARD, 2. MANDAMUS, 10. REPLEVIN, 2-4. REVIEW, 37. TRIAL, 9.

Damages.

1. A petition in an action for death by wrongful act will not support a judgment for damages where it fails to show that plaintiff sustained pecuniary injury. *Orgall v. Chicago, B. & Q. R. Co.*..... 4

Creditors' Bill.

2. An amended petition to set aside a fraudulent transfer of property and subject it to the payment of a judgment against the transferor held not to state a different cause of action from that originally pleaded. *Monroe v. Reid*... 317

Demurrer.

3. A demurrer to a pleading does not admit the correctness of the conclusions of law drawn by the pleader. *American Water-Works Co. v. State*..... 194

Money Had and Received.

4. One who sues an attorney for money and alleges that it was, without a contract, paid by a judgment debtor to the attorney for the use of plaintiff and wrongfully retained, should recover the amount claimed or nothing, where defendant answers that he retained only the sum due him under a contract with plaintiff. *Wigton v. Smith*..... 461

Petition.

5. A plaintiff must recover, if at all, on the cause of action stated in his petition. *Id.*..... 465

Reply.

6. It is not the province of a reply to introduce a new cause of action. *Id.*

Confession and Avoidance.

7. Evidence to prove a defense in the nature of a confession and avoidance is incompetent under a general denial. *Keens v. Robertson*..... 837

New Matter.

8. New matter constituting a defense is not available under a general denial, but should be specially pleaded. *Home Fire Ins. Co. v. Berg*..... 600

Practice.

9. Case where a motion to strike out portions of a pleading was sustained after an answer to the merits had been filed. *State v. Roper* 739

Pleading—concluded.*Names of Parties.*

10. The word "agent" following the name of plaintiff in a petition is *descriptio personæ*. *Thomas v. Carson*..... 765

Prayer.

11. The prayer is not a part of the statement of facts required to constitute a cause of action, and the omission of a demand for judgment does not subject the petition to general demurrer. *Fox v. Graves* 812

Inconsistent Counts.

12. Where a petition contains two inconsistent counts, one of them, on motion of defendant, may be stricken out or plaintiff required to elect as to the cause of action upon which he will proceed. *Id* 813

Motions.

13. A motion may properly be overruled where it cannot be allowed in substantially the same terms as requested. *Id.*, 817

Estoppel.

14. If the facts constituting an estoppel are in any way sufficiently pleaded, the pleader is entitled to the benefit of the law arising therefrom. *City Nat. Bank of Hastings v. Thomas* 862

Policemen. See SHERIFFS AND CONSTABLES, 3-6.

Possession. See FRAUDULENT CONVEYANCES, 1.

Practice. See BILL OF EXCEPTIONS, 3. CONTEMPT, 5. CRIMINAL LAW, 19, 29. EXECUTIONS, 9. JUDGMENTS, 9. MANDAMUS, 4. NOTICE, 2. PLEADING, 9, 12. REVIEW, 37. TIME. TRIAL, 7.

1. Agreements of counsel in regard to the trial of a cause may be set aside by the court. *Keens v. Robertson* 837
2. Under the Code a court has no authority to enter an involuntary nonsuit. *Zittle v. Schlesinger* 844

Preliminary Examination. See CRIMINAL LAW, 22.

Principal and Agent. See BANKS AND BANKING, 7. EMBEZZLEMENT. PENITENTIARY, 1.

1. The unauthorized acts of an agent or officer of a corporation may be ratified by it indirectly or by express action. *Reed v. First Nat. Bank of Weeping Water*..... 168
2. One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws. *Johnston v. Milwaukee & Wyoming Investment Co* 480

Principal and Agent—concluded.

3. Where a principal placed an agent in such a situation that a person conversant with business usages is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. *Id.*
4. Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business. *Id.*
5. Evidence to be considered in determining an agent's apparent authority. *Id.*
6. The apparent authority of an agent which will bind his principal is such authority as the former appears to have by reason of his actual authority. *Creighton v. Finlayson*, 457
7. Sufficiency of evidence to sustain a finding that the agent of a landlord had authority to bind his principal by an agreement to pay the expense of moving the goods of a tenant from leased premises, upon consideration of the latter's yielding possession. *Id.* 458
8. From the fact that one brought suit for the price of beer agreed upon between himself and defendant, it was held that the latter was not a mere agent for the sale of plaintiff's beer. *Storz v. Finklestein* 579
9. Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one who has placed the agent in a position to perpetrate the fraud must suffer. *City Nat. Bank of Hastings v. Thomas* 867

Principal and Surety. See ABSTRACTS OF TITLE, 2. HUSBAND AND WIFE, 4. NEGOTIABLE INSTRUMENTS, 4.

1. A surety who paid a renewal note executed only by himself and principal to discharge the original note signed by several co-sureties cannot enforce contribution against the latter. *Chapman v. Garber* 16
2. The sureties on a builder's bond were not released from liability for the payment of claims of laborers and material-men because the contractor was paid, on estimates as the work progressed, a greater percentage than that fixed by the contract. *Kaufmann v. Cooper* 644
3. The sureties on a builder's bond were not released from liability for the payment of claims of laborers and material-men because of the dissolution or change in the membership of the contracting firm. *Id.*

Principal and Surety—concluded.

4. Sufficiency of evidence to sustain a verdict for plaintiff who was surety on a note, who paid the debt and sued the principal makers, the defense being that the note was executed without consideration. *McCormac v. Redden*..... 776

Privileged Communications. See WITNESSES, 5.**Prize Fighting.**

- Lindsay v. State*..... 180

Property. See OFFICE AND OFFICERS, 3.**Prosecuting Attorneys.** See COUNTY ATTORNEYS.**Public Corporations.** See WATER COMPANIES.**Public Policy.** See CONTRACTS, 7.**Quantum Meruit.** See ATTORNEY AND CLIENT, 2. CONTRACTS, 2.**Quieting Title.** See ADVERSE POSSESSION.

- A decree in equity establishing the execution and loss of a deed, neither acknowledged nor recorded, is competent evidence in an action to quiet title, where plaintiff purchased the land at sheriff's sale under a judgment against the grantee who subsequently executed a deed to defendant. *Connell v. Galligher* 372

Quo Warranto. See OFFICE AND OFFICERS, 8.**Railroad Companies.** See CARRIERS.

1. A grant of a strip of land to a railroad company for right of way and for operating its railway only is a mere easement. *Blakely v. Chicago, K. & N. B. R. Co.*..... 272
2. A land-owner who grants to a company an easement limited to a right of way for its road may recover compensation from another independent company, where the latter occupies a portion of such right of way and operates its road thereon solely under a conveyance from the former company. *Id.*
3. The transfer switch law (Session Laws, 1893, p. 142, ch. 11) is invalid, as violating the fourteenth amendment of the federal constitution providing that no state shall "deprive any person of life, liberty, or property without due process of law." *State v. Sioux City, O'N. & W. R. Co.*..... 683
4. In an action against a railway company for negligently setting out fire, it was held, under the evidence referred to in the opinion, that the issue of negligence in the construction and maintenance of the engine causing the fire

Railroad Companies—concluded.

was properly submitted to the jury. *Union P. R. Co. v. Ray* 750

5. The owner of land near a railroad is not required to forbear the ordinary use of such land, nor to take unusual precautions to guard against the consequences of probable negligence of the railway company. *Id.*

Rape.

1. Where the prosecutrix is under the statutory age of consent, evidence of resistance or consent is immaterial. *Wood v. State*..... 58
2. During cross-examination of prosecutrix defendant may inquire as to the particular facts stated by her in complaining of the injury. *Id.*
3. Complaints of the injured person are admissible only as corroborative of her testimony, and are not, except when made in *extremis*, admissible as independent evidence of the offense. *State v. Meyers*..... 152
4. Where the injured person does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify on account of imbecility is immaterial. *Id.*
5. The word "abuse," in the sense in which it is used in sec. 12, Criminal Code, is synonymous with the word "ravish." *Chambers v. State*..... 447
6. An instruction that "carnal abuse" does not necessarily mean abuse by sexual intercourse held erroneous. *Id.*..... 448

Ratification. See COUNTIES, 10, 11. PRINCIPAL AND AGENT, 1.

Real Estate Agents. See CONTRACTS, 2.

- A broker does not earn his commission by producing one able to purchase only by a resort to an unlawful device, though a contract of sale is entered into which the principal refuses to consummate because it involves a fraud upon a third person. *Zittle v. Schlesinger*..... 844

Records.

- A court has power to amend its records to conform to the facts, and may proceed upon any satisfactory evidence. *School District v. Bishop*..... 850

Reference.

1. Confirmation of referee's report. *Warren v. Raben*..... 115
2. Findings of fact reported by a referee stand in the same position as the verdict of a jury. *School District v. Bishop*, 850

Reference—concluded.

3. The supreme court will not reverse an order of the trial court setting aside the report of a referee in an action at law, where he failed to report any finding on material issues. *Id.*

Release. See CHATTEL MORTGAGES, 1-3.

Remedies. See ELECTION OF REMEDIES.

Remittitur.

Where the amount of excess of a verdict appears from the record for review, permission may be given to file a remittitur as a condition of affirming the judgment. *Creighton v. Finlayson*.....

460

McCormal v. Redden..... 776

Repeal. See STATUTES, 17, 18.

Replevin. See CHATTEL MORTGAGES, 8. SALES, 7.

1. It is error to instruct the jury that a purchaser who did not take possession cannot recover the property from an officer attaching it as that of the seller if the purchaser did not obtain possession before levy of the writ, though he had no notice of the seller's fraudulent intent. *Powell v. Yeazel* 225
2. In replevin before a justice of the peace the statutory affidavit is the basis of the action, is jurisdictional, and must be filed before issuance of the writ. *Commercial State Bank of Crawford v. Ketcham*..... 568
3. Defective statements in an affidavit for replevin may be amended so as to make clear or certain that which was indefinite or uncertain. *Id.*
4. Where a writ of replevin is issued in favor of a corporation or partnership upon the affidavit of an agent or officer whose allegations refer to the property rights involved as those of affiant, the affidavit cannot be amended so as to make it refer to such rights as those of plaintiff. *Id.*

Res Adjudicata. See BILL OF EXCEPTIONS, 3.

An order of a county board in allowing or rejecting claims against the county has the force of a judgment and is binding on the parties thereto unless vacated or reversed on appeal. *Heald v. Polk County*.....

29

Ragoss v. Cuming County 36

State v. Vincent..... 408

Res Gestæ.

Definition of term "*res gestæ*." *Collins v. State*..... 38

Return. See EXECUTIONS, 12.

Review. See APPEAL BONDS. BILL OF EXCEPTIONS. CONTEMPT, 3-6. CONTINUANCE. CRIMINAL LAW. DAMAGES, 4. INJUNCTION, 1, 2. INSTRUCTIONS. JURY, 1. REMITTITUR. TRIAL, 1.

1. The supreme court will not review a judgment of the district court upon allegations of error where the successful party is entitled to judgment on the pleadings. *Orgall v. Chicago, B. & Q. R. Co.*..... 4
2. Where the trial court is without jurisdiction it cannot be acquired in the appellate court by appeal. *Keeshan v. State.*..... 155
3. A party who asks his adversary to offer in evidence a written instrument cannot urge in the appellate court that it should have been excluded as incompetent. *Smith v. Brown.*..... 230
4. One who knows of irregularities in reviewing a verdict, and does not at the time object, cannot, for the first time, complain of such irregularities in the appellate court. *Jones v. Driscoll.*..... 575
5. Where an appeal to the district court is taken in time, and both parties appear and without objection file pleadings, it is then too late for the appellee to object to the validity of the appeal. *Clafin v. American Nat. Bank of Omaha.*..... 884
6. The rules for reviewing an order setting aside a verdict will be observed in reviewing the action of the district court in setting aside a referee's report. *School District v. Bishop.*..... 850
7. In an error proceeding from the confirmation of a judicial sale the supreme court will not review a question involving the merits of the original decree. *Beatrice Paper Co. v. Beloit Iron Works.*..... 900
Transcripts.
8. The transcript for review imports verity and if erroneous must be corrected below. *Ford v. State.*..... 390
9. In an error proceeding in the district court recitals in the transcript from the inferior court should prevail over a contradictory statement in an affidavit. *Jones v. Driscoll.* 575
10. The supreme court does not acquire jurisdiction of an appeal unless the transcript filed therein has been properly authenticated by the clerk of the district court. *McDonald v. Grabow*..... 406
Otis v. Butters...... 492

Review—continued.

11. A stipulation by the parties that a transcript for review contains all the proceedings below cannot be substituted for a certificate of the clerk of the district court. *McDonald v. Grabow*..... 406
12. Reference to an order of the supreme court directing the clerk of the district court to send up the original instructions, and examination of the instructions in the appellate court. *Shafer v. Briggs*..... 445

Bill of Exceptions.

13. A stipulation of facts filed below, after judgment, cannot be considered upon review of the judgment. *Bowen v. State*..... 23
14. Allegations of error based on the existence of facts will not be considered in absence of a showing that evidence was introduced below. *Id.*
15. Affidavits used as evidence below will not be examined on review unless preserved by a bill of exceptions. *Korth v. State*..... 631
16. Error in reading a deposition to the jury will not be held prejudicial where it was not preserved by a bill of exceptions. *Keens v. Robertson* 837
17. Where there was a stipulation for a continuance, and a dismissal at the same term, the order of dismissal cannot be reviewed in absence of a record showing the grounds of the court's ruling. *School District v. Bishop*..... 850
18. The action of the court in refusing instructions cannot be reviewed in absence of a bill of exceptions. *City Nat. Bank of Hastings v. Thomas*..... 861
19. In reviewing the charge to the jury, where there is no bill of exceptions, the court can only inquire as to whether the instructions could properly be given under the pleadings. *Id.*
20. Where the bill of exceptions has been quashed and the petition in error fails to present a question for review, the judgment below may be affirmed. *Sweeney v. Ramge* 919

Final Orders.

21. An appeal cannot be prosecuted from the district court to the supreme court until a final order has been entered below. *Einspahr v. Smith*..... 138
22. An order continuing in force during the pleasure of the court a temporary injunction is not a final order. *Id.*
23. An order setting aside a verdict and granting a new trial during the term at which the verdict was rendered cannot

Review—continued.

- be made the basis of an error proceeding. *Johnson v. Parrotte*..... 52
24. An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal. *Lewis v. Barker*..... 662
25. A party not injuriously affected by a county court's final order of distribution in the settlement of an estate cannot appeal. *Merrick v. Kennedy*..... 264
26. An order to be reviewable on error or appeal must dispose of the merits of the case. *Bartram v. Sherman*..... 713
- Briefs.*
27. Where a statute is attacked as unconstitutional, the section of the constitution infringed by the law should be pointed out in the brief. *Boyes v. Summers* 308
28. Errors assigned but not argued are deemed waived. *Johnson v. Gulick*..... 817
29. Assignments of error not noticed in plaintiff in error's brief are waived. *Kaufmann v. Cooper*..... 645
- Assignments of Error.*
30. Counsel should not present in the supreme court unfounded assignments of error. *Wood v. State*..... 61
31. Errors as to giving and refusing instructions should be separately assigned. *Kaufmann v. Cooper*..... 644
32. Allegations of error relating to rulings on evidence will be disregarded where the testimony involved is not pointed out in the petition in error. *Redman v. Voss*..... 512
- Brumback v. German Nat. Bank of Beatrice*..... 546
- Instructions.*
33. An allegation of error as to giving or refusing a group of instructions is insufficient. *Grossman v. State*..... 22
34. Counsel should not indulge in captious or unjust criticism of the instructions of the trial court. *Shafer v. Briggs*... 445
35. Where plaintiff fails to recover on his cause of action, his objections to instructions relating to the measure of damages will not be considered. *Olsen v. Meyer*..... 241
- Motion for New Trial.*
36. An objection as to admission of incompetent testimony will not be considered where the point is not raised by motion for a new trial or petition in error. *Viergutz v. Aultman* 143
37. A record may be reviewed to ascertain whether the pleadings support the judgment below, though there was no

Review—continued.

- motion for a new trial. *Hansen v. Kinney*..... 207
Farris v. State..... 857
38. Where plaintiff in error did not file a motion for a new trial the court will not go back of the verdict of the jury or findings of the court to review the proceedings below. *Hansen v. Kinney*..... 207
39. An objection that the verdict is for a sum greater than that prayed for will be deemed waived unless raised by motion for a new trial. *Fox v. Graves*..... 813
40. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it. *School District v. Bishop*..... 850
41. A judgment of the district court dismissing an appeal may be reviewed without a motion for a new trial or an exception to the ruling. *Clafin v. American Nat. Bank of Omaha* 884
- Sufficiency of Evidence.*
42. Where there is no error in the proceedings, and the verdict is sustained by sufficient evidence, the judgment may be affirmed. *Shafer v. Briggs* 445
43. Findings of a jury sustained by sufficient evidence will not be disturbed on review. *Kaufmann v. Cooper*..... 644
- Conflicting Evidence.*
44. Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court. *Hough v. Stover*..... 588
Haubrock v. Loeb 868
- Appeal and Error.*
45. Where the judgment below is appealable, the party aggrieved may have it reviewed by petition in error or appeal, but cannot pursue both remedies. *Beatrice Paper Co. v. Beloit Iron Works*..... 900
46. A party abandons his right to prosecute an appeal where he files a petition in error. *Monroe v. Reid* 316
Beatrice Paper Co. v. Beloit Iron Works..... 900
47. A party must elect as to whether he will prosecute a proceeding in error or an appeal. *Monroe v. Reid*..... 316
- Harmless Error.*
48. Admission of incompetent testimony is not ground of reversal in a case tried to the court without a jury. *Viergutz v. Aultman*..... 143
49. A judgment should not be reversed for error not prejudicial. *Tracey v. State*..... 362

Review—concluded.

50. A nonsuit and judgment of dismissal, though erroneous, will not be reversed where defendant was entitled to have a verdict directed. *Zittle v. Schlesinger*..... 844

Parties to Appeal.

51. One of several defendants having separate and distinct defenses may prosecute an appeal to the district court without joining his co-defendants. *Clafin v. American Nat. Bank of Omaha*..... 884
52. Where the interests of several defendants are inseparably connected, an appeal by one defendant brings up the entire case. *Id.*

Robbery.

1. In a prosecution for robbery everything said and done by the prosecuting witness and accused at the time of the assault is competent evidence. *Tracey v. State*..... 362
2. An averment of the information as to the character of the money taken is surplusage and need not be proved. *Id.*
3. In pronouncing judgment upon one convicted of robbery the court may consider all the circumstances in evidence under which the crime was committed. *Id.*

Sales. See ATTACHMENT, 1. CONTRACTS, 8. FRAUDULENT CONVEYANCES.

1. On a contract for the delivery of goods the vendee is not entitled to recover when delivery was tendered at the time for performance and the tender kept good. *Mayer v. Ver Bryck*..... 221
2. Instructions and evidence as to measurement of hay sold by the cubic foot. *Smith v. Brown*..... 230
3. The weight of hay is immaterial where it is sold by the cubic foot. *Id.*
4. An order for nursery stock stating the price in a lump sum is not severable, and the orderer is not obliged to receive the stock where a material portion of it is not of the kind or quality ordered. *Bryant v. Thesing*..... 244
5. In a suit to recover the price of nursery stock defendant may show that the stock was not the kind and quality ordered, though he did not refuse it on that ground when delivery was tendered, but based his refusal upon a cancellation of the order. *Id.*
6. A purchaser cannot assert a greater interest in personality than the seller had, unless the real owner is estopped from asserting title. *Campbell Printing Press & Mfg. Co. v. Dyer*, 830

Sales—concluded.

7. Under a contract that a buyer is not to acquire title until he pays the purchase price, it was *held* that one to whom the buyer mortgaged the property was not entitled to possession as against the conditional seller. *Id.*
8. An abandonment of a contract of sale may be effected by acts of one of the parties inconsistent with its existence and acquiesced in by the other party. *Hall v. Eccles*, 880

Satisfaction. See CHATTEL MORTGAGES, 1.

School Lands.

Where a lease authorized by statute allows the lessee to select one of the arbitrators to reappraise the land at the end of five years, the legislature cannot take away that right by a subsequent act. *State v. Thayer*..... 137

Schools and School Districts.

A district school board should not ordinarily be mandamusd to purchase text-books, where it may lawfully apply the available funds to other purposes. *Farris v. State*..... 857

Seals. See CORPORATIONS, 10.

Sentence. See CRIMINAL LAW, 1, 3, 4.

Set-Off. See USURY, 1.

Set-Off and Counter-Claim. See CORPORATIONS, 12.
TRIAL, 9.

1. In a suit for rent a finding for the tenant was sustained, where he pleaded a counter-claim based on an agreement by the landlord to pay the expense of moving the property of the tenant upon condition of the latter's yielding possession of the leased premises. *Creighton v. Finlayson*... 457
2. A cause of action arising upon contract may properly be pleaded by way of set-off in an action for damages. *Jones v. Driscoll*..... 575

Sheriffs and Constables. See ATTACHMENT, 4. EXECUTIONS.

1. A sheriff is an officer elected to an office of public trust. *Conley v. State*..... 187
2. A sheriff who converts to his own use money collected by virtue of his office may be prosecuted for embezzlement under sec. 121, Criminal Code. *Id.*
3. In absence of statutory authority an officer may arrest without a warrant, and detain for a reasonable time, one he has reason to believe guilty of a felony. *Diers v. Mallon*... 121
4. An officer without a warrant may be justified in making

Sheriffs and Constables—concluded.

an arrest where he acts in good faith and has reason to rely upon information that accused is guilty of a felony, though the officer has no personal knowledge of the facts, and the prisoner's innocence should subsequently be established. *Id.*

5. An officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to taking life. *Lamma v. State*..... 236
6. Where a felon can be arrested, or his escape prevented without killing him, and he is slain by a sheriff, the latter is at least guilty of manslaughter. *Id.*
7. In construing sec. 42, ch. 28, Comp Stats., it was held that sheriffs are not liable absolutely for the payment of the salaries of their deputies, and that such salaries are to be paid out of the fees earned and collected. *Wolfe v. Kyd*... 292
8. It is the duty of an officer under a writ of attachment to take possession of personal property, keep it under his control, and have it forthcoming to answer the judgment of the court; and he may lawfully return as costs the reasonable and necessary expenses incurred. *Deering v. Wisherd*... 720

Slander. See LIBEL AND SLANDER.

Stare Decisis.

1. Duty of state courts to follow decisions of the supreme court of the United States where the latter is the final arbiter. *Norfolk Nat. Bank v. Schwenk*..... 389
2. The construction of provisions of the federal constitution by the supreme court of the United States should be followed by state courts in matters where such provisions are applicable. *State v. Sioux City, O'N. & W. R. Co.*..... 682

State and State Officers. See OFFICE AND OFFICERS. PENITENTIARY.

State Treasurer.

The state treasurer, not the chairman of the board of public lands and buildings, is charged with the duty of receiving and disbursing public funds, and the latter is not chargeable upon his bond with money of which the former is the lawful custodian. *State v. Holcomb*..... 615

State University.

Ch. 65, Session Laws, 1895, providing for a uniform system of vouchers, applies to claims against the state university. *State v. Moore*..... 373

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. COUNTIES, 8-10.
EMBEZZLEMENT, 11. FEES. OFFICE AND OFFICERS,
2, 9. TABLE, *ante*, p. lxiii.

Conflict.

1. Where different parts of the same statute are conflicting, the last words stand, and those in conflict therewith are disregarded. *Van Horn v. State*..... 63

Amendments.

2. Sec. 11, art. 3, of the constitution, relating to amendments, has no application to acts complete in themselves, and not in their effect amendatory. *Id.*

Titles of Bills.

3. Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. *Id.*, 62
4. Ch. 28, Session Laws, 1895, providing for township organization, has but one subject, which is clearly expressed in its title. *Id.*..... 63
Cooperrider v. State 85
5. Sec. 5, ch. 66, Session Laws, 1895, providing for the leasing of convict labor, is not within the title of the act, and is, therefore, in conflict with the provision of sec. 11, art. 3, of the constitution, requiring the subjects of acts to be clearly expressed in their titles. *State v. Holcomb* 613

Uniformity.

6. Where a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting in uniformity of operation. *Van Horn v. State*..... 63

Special Provisions.

7. Special provisions of a statute in regard to a particular subject control general provisions. *Merrick v. Kennedy* ... 264

Construction.

8. Construction of sec. 42, ch. 28, Comp. Stats., in relation to compensation of certain county officers and their deputies. *Wolfe v. Kyd* 292
9. Where, by any reasonable construction, the subject-matter of legislation can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court. *Board of Directors of Alfalfa Irrigation District v. Collins*..... 411

District Irrigation.

10. The district irrigation law (Session Laws, 1895, p. 269,

Statutes—concluded.

- ch. 70) does not conflict with the constitution by authorizing the taking of property for private use. *Id.*..... 412
11. The district irrigation law is not unconstitutional on the ground that it confers power upon districts to levy taxes without limitation. *Id.*
12. The district irrigation law does not conflict with the constitution on the ground that it confers legislative power upon county boards. *Id.*

Time of Going Into Effect.

13. The term "calendar month," as used in sec. 24, art. 3, of the constitution, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. *McGinn v. State* 427
14. The provision of sec. 895 of the Code, for the exclusion of the first day in computing the time within which an act is to be done, applies to the construction of statutes. *Id.*
15. The act approved April 8, 1893 (Session Laws, p. 385, ch. 44), amending sec. 3 of the Criminal Code so as to fix the penalty for murder in the first degree at death or imprisonment for life, in the discretion of the jury, took effect July 9, 1893. *Id.*

Penitentiary.

16. The provision of sec. 32, Session Laws, 1870, p. 31, that all transactions and dealings of the state penitentiary shall be conducted in the name of the warden, conflicts with the act defining the duties of the board of public lands and buildings and was thereby repealed. (Session Laws, 1877, p. 188, sec. 19.) *State v. Holcomb.* 612

Repeal.

17. A statute will not be construed as repealing by implication another statute, unless the repugnancy between the two is plain and unavoidable. *Beatrice Paper Co. v. Beloit Iron Works* 901
18. Ch. 46, p. 226, Session Laws, 1881, granting certain powers to district judges at chambers, did not repeal sec. 498 of the Code, nor sec. 39, p. 90, Session Laws, 1879, relating to the confirmation of judicial sales. *Id.*

Stenographers. See BILL OF EXCEPTIONS, 3.

Stockholders. See CORPORATIONS.

Subrogation.

- A purchaser of mortgaged chattels at execution sale is subrogated to the mortgagor's rights in the property at the time of the levy. *Gould v. Armagost.*..... 897

Subscriptions. See CORPORATIONS, 3, 5, 11, 12. EVIDENCE, 4.

Summons. See ATTACHMENT, 4.

Supersedeas. See APPEAL BONDS. INJUNCTION, 1, 2.

Supervisors. See TOWNSHIPS.

Supreme Court.

The supreme court is one of limited original and appellate jurisdiction. *Johnson v. Parrotte*..... 51

Tacking. See MECHANICS' LIENS.

Talesmen. See JURY.

Taxation. See CONSTITUTIONAL LAW, 7, 8. INJUNCTION.

1. The power of taxation has been committed by the people to the discretion of the legislature, and for an abuse of that trust the remedy is by appeal to the people in the manner prescribed by law. *Board of Directors of Alfalfa Irrigation District v. Collins*..... 412
2. The provision of sec. 1, art. 9, of the constitution, for uniform taxation, relates to the revenue required for general purposes of state and municipal government, and has no application to assessments for local improvements. *Id.*

Time. See EXECUTIONS, 12. VOLUNTARY ASSIGNMENTS.

The provisions of sec. 895 of the Code, for the exclusion of the first day in computing the time within which an act is to be done, applies alike to the construction of statutes and to matters of practice. *McGinn v. State*..... 427

Townships.

1. Township organization. *Van Horn v. State*..... 62
2. Sec. 5, art. 10, of the constitution confers upon the people by vote the power of adopting and discontinuing township organization, but leaves to the legislature the power of providing the details of such organization. *Id.*
3. Where supervisors are local officers, their number and the manner of their election are subjects connected with township organization, and not solely related to county government. *Id.*
4. The legislature may amend the law in regard to township organization without referring the change to a vote of the people. *Id.*
5. The legislature, when it reduces the number of officers, may provide that those already elected shall cast lots to determine whose terms shall be discontinued, and may provide for filling vacancies provisionally by appointment. *Id.*

Transcripts. See CRIMINAL LAW, 21. REVIEW, 8-12.

Transfer Switches. See RAILROAD COMPANIES, 3.

Trial. See CONTINUANCE, 1. CRIMINAL LAW. EVIDENCE, 2. FALSE IMPRISONMENT, 4, 5. HOMICIDE, 8, 12. INSTRUCTIONS. JURY. NEW TRIAL. RAPE, 2. REVIEW, 48, 50.

1. In a trial to the court without a jury the admission of incompetent evidence is not reversible error. *Monroe v. Reid*, 317

Offer of Proof.

2. Where a question is excluded the offer of proof must correspond to the question. *Keens v. Robertson*..... 837
3. An order sustaining an objection to a question will not be held erroneous in absence of a statement, or proof, as to the fact in issue. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*..... 351
Keens v. Robertson..... 837

Verdict.

4. Irregularities in receiving a verdict should be objected to at the time they occur. *Jones v. Driscoll*..... 575
5. Objections to the form of verdict should be made at the time it is rendered. *Brumback v. German Nat. Bank of Beatrice*..... 540
6. It is not error to refuse to submit a form of verdict not responsive to all the issues in the case. *Id.*

Directing Verdict.

7. It is the duty of the trial court to direct a verdict for the plaintiff where the evidence will not support a finding for the defendant. *Dehning v. Detroit Bridge & Iron Works*... 556
Hards v. Platte Valley Improvement Co...... 709
Zittle v. Schlesinger..... 844
8. Where the evidence is sufficient to sustain a finding for plaintiff it is error to direct a verdict for defendant. *McKinney v. Hopwood* 871

Question Reserved.

9. The question whether or not a recovery should be had by one of the parties to an unlawful contract may remain open for determination upon the pleadings, in a suit to recover the price of beer, after the jury finds for plaintiff pursuant to an admission that defendant obtained the goods and owes the sum claimed, where there has been no ruling or finding upon the latter's counter-claim for payment for a license which plaintiff agreed to furnish. *Storv v. Finklestein*..... 580

Trial—*concluded.**Absence of Witnesses.*

10. An objection to proceeding with a trial on account of the absence of witnesses should be made when the case is called. *Kreamer v. Irwin*..... 827

Stipulations of Counsel.

11. The court may set aside stipulations of counsel in regard to the trial of a cause. *Keens v. Robertson*..... 837

Hypothetical Questions.

12. An objection that a hypothetical question put to an expert witness is incompetent, immaterial, and irrelevant, is too general to raise the point that the question involves erroneous statements of evidence. *Chicago, R. I. & P. R. Co. v. Archer*..... 907
13. It was *held* not error for the court, in overruling an objection to a hypothetical question, to remark, "I think that is a fair epitome of the evidence already given in the case." *Id.*

Trover and Conversion. See EMBEZZLEMENT.**Trusts.** See CORPORATIONS, 3, 7. MORTGAGES. PARTNERSHIP, 1.

1. Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account. *Cady v. South Omaha Nat. Bank*..... 756
2. So long as trust funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust. *Id.*

Ultra Vires. See COUNTIES, 10, 11.**University of Nebraska.** See VOUCHERS.**Usury.**

1. Usury paid to a national bank cannot be set off in a suit by it, commenced more than two years after such payment, to recover the principal debt. *Norfolk Nat. Bank v. Schwenk*..... 381
Lanham v. First Nat. Bank of Crete..... 663, 668
2. Where a national bank charges for a loan usurious interest which is included in the note, in an action to enforce the contract the entire interest is forfeited. *Norfolk Nat. Bank v. Schwenk*..... 381
3. Where illegal interest has been received by a national bank, the borrower may recover double the amount of interest actually paid. *Id.*

Usury—concluded.

4. A contract providing for interest at a certain rate until maturity and for a higher lawful rate thereafter is not usurious. *Omaha Loan & Trust Co. v. Hanson* 870

Vacancies. See OFFICE AND OFFICERS, 6-9.

Variance. See CRIMINAL LAW, 19.

Venditioni Exponas. See EXECUTIONS, 4, 5.

Vendor and Vendee. See ESTOPPEL, 2. GUARDIAN AND WARD, 6. MORTGAGES. REAL ESTATE AGENTS.

Venue.

- Correctness of ruling where a change of venue was demanded and refused in a trial for murder. *Lindsay v. State*..... 177

Verdict. See TRIAL, 4-8.

Voluntary Assignments.

- One who, through his own fault and neglect, fails to present his claim for allowance within the time fixed by law, in conformity with the order of the county court, is forever barred. *Commercial Nat. Bank of Omaha v. Lipp*..... 595

Vouchers.

- Chapter 65, Session Laws, 1895, providing for a uniform system of vouchers, applies to claims against the state university. *State v. Moore* 373

Waiver. See CONTEMPT, 5. CRIMINAL LAW, 9. INSURANCE, 1. PLEADING, 9. REVIEW, 4, 28, 29, 39.

Warden. See PENITENTIARY.

Wards. See GUARDIAN AND WARD.

Water Companies.

1. A water company with a franchise from a city must supply water to all the inhabitants at a reasonable and uniform price. *American Water-Works Co. v. State*..... 194
2. A water company may adopt reasonable and just rules for its convenience and security, and may refuse to furnish water to one who fails to comply with such rules. *Id.*
3. Rules of a water company, to be enforceable, must be lawful and just and not discriminatory. *Id.*..... 195
4. The provision of a rule applying to a customer in default, which requires him to pay, as a condition to his right to be supplied with water, the sum of one dollar in excess of the rent, is unreasonable, discriminatory, and void. *Id.*

Weights and Measures. See CONTRACTS, 3.

Wills. See NEGOTIABLE INSTRUMENTS, 5, 6.

- A suit by an heir and devisee against an executor for the construction of a clause in a will devising real estate may be dismissed, where it appears that the latter has no interest in the adjudication and that an interpretation will not assist him in administering the estate. *Kennedy v. Merrick*..... 260

Witnesses. See CONTEMPT, 9-12. CRIMINAL LAW, 18, 20. EVIDENCE, 7, 8. HOMICIDE, 16, 17. HUSBAND AND WIFE, 1. INDICTMENT AND INFORMATION, 7.

1. Whether the rule limiting the re-examination of a witness to the points arising on cross-examination should be enforced rests with the trial judge. *Collins v. State*..... 37
2. A witness on redirect examination may make clear matters left obscure or incomplete by his answers on cross-examination. *Id.*
3. Where defendant in a prosecution for abortion testifies in chief that his acquaintance with the woman was not intimate, it may be shown by him, on cross-examination, that he had been criminally intimate with her. *Dixon v. State*, 299
4. One who by reason of insanity or imbecility is unable to comprehend the obligation of an oath, or to understand and answer questions, is incompetent to testify as a witness. *State v. Meyers*..... 152
5. Information voluntarily entrusted to an attorney at law, where the relation of attorney and client does not exist, is not a privileged communication. *Home Fire Ins. Co. v. Berg*..... 600

Words and Phrases.

1. "Abuse." *Chambers v. State*..... 447
2. "Calendar month." *McGinn v. State*..... 427
3. "Corn-crib." *Metz v. State*..... 550
4. "Crimes." *Bohner v. Bohner*..... 205
5. "District court of competent jurisdiction." *Huberman v. Evans*..... 784
6. "Due process of law." *Board of Directors of Alfalfa Irrigation District v. Collins*..... 411
7. "Executions." *Burkett v. Clark*..... 466
8. "Forthwith." *Id.*..... 467
9. "Practicing medicine." *O'Connor v. State*..... 158
10. "Probable cause." *Diers v. Malton*..... 122
11. "*Res gestæ*." *Collins v. State*..... 38
12. "Storehouse." *Metz v. State*..... 550
13. "Warehouse." *Id.*

Writs. See MANDAMUS, 4.